IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

S. Krishnan .. *Petitioner**

v.

M/s. Aruna and Associates, Madras-4 .. *Respondent.*

Partnership Act (IX of 1932), section 69 (2)—Suit for recovery of money—Suit filed by unregistered firm—Suit non est *in law—Amendment of plaint sought to convert suit as one by individual proprietor on the dissolution of the unregistered firm — Amendment impermissible.*

Messrs. Aruna and Associates, an unregistered firm filed a suit for recovery of money for work done as contractors. After the suit was filed, an amendment of the plaint was sought for and allowed so as to convert the suit as one instituted by a person as the sole proprietor thereof. On revision to the High Court by the defendant,

Held: A suit filed by an unregistered partnership should even at the threshold be deemed to be an action *non est* in the eye of law because of, the specific mandate under section 69 (2) of the Partnership Act. This compulsion, which is in the nature of a statutory mandate cannot be avoided in any manner. The mandate contained in section 69 (2) is so assertive that it says that no suit shall be brought in by an unregistered firm. Such being the prescription, it should be presumed that such an action brought into Court by the unregistered partnership though knowing it was an unregistered firm as if it was a partnership firm had to be ignored and had to be treated as non-existent.

[*Para.* 6.]

A person cannot approbate and reprobate. When once he takes up a stand that it is a partnership firm he should stand by it. Once he takes the position that it is a dissolved firm, equally he should be prepared to substantiate it. But he cannot have a third way out of it by bringing in a person who was a quondam partner of an unregistered firm as if he has become the proprietor thereof on dissolution. This metamorphosis is not available in law. [*Para.* 8.]

Cases referred to:—

Md. Abdul Samad v. *Madarsa Rowther*, (1959) 1 M.L.J. 309: 72 L.W. 313: I.L.R. (1959) Mad. 802: A.I.R. 1959 Mad. 440; *Chunilal* v. *Ahmed Rowther*, A.I.R. 1960 Ker. 159.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court, Madras in I.A. No. 25543 of 1976 in O.S. No. 3472 of 1974.

C. Harikrishnan, for Petitioner.

N. Srivatsamani, for Respondent.

The Court made the following

ORDER.—This Civil Revision Petition is against an order of the learned City Civil Judge, who allowed an amendment of the plaint which amendment was under the following circumstances, as mentioned by the Court below:

> "....It is stated in the affidavit that the petitioner-plaintiff has filed the suit for recovery of Rs. 24,711-30 due to him as charge for construction work carried on by him. It is also stated in the affidavit that the plaintiff's firm was a partnership and that the partnership was dissolved on 22nd February, 1972. After the dissolution

* C.R.P. No. 2864 of 1977.

24th October, 1978.

the plaintiff was carrying on the business as the sole proprietor of the plaintiff firm. At the time of the institution of the suit this fact was not brought to the notice of the counsel. The firm has been running by the plaintiff as the sole proprietor. Hence he prays that the plaint should be suitably amended and that the long cause title should be permitted to be suitably amended."

2. Messrs. Aruna and Associates was originally a partnership firm. It is said to have been dissolved on 22nd February, 1972. In spite of such a dissolution having taken place and in spite of the fact that it is alleged that the petitioner who sought for an amendment in the lower Court professed that he became the sole proprietor of Messrs. Aruna and Associates, the suit was instituted on 27th April, 1974 in the name of the firm Messrs. Aruna and Associates but describing the same as a partnership firm carrying on business as Engineers and Contractors at Madras.

3. The suit was resisted *inter alia* on the ground that the plaint partnership firm was an unregistered one and, therefore, no suit could be filed by an unregistered firm in its own name without the same being registered in a manner known to law under the Partnership Act. A specific issue was also raised on 28th August, 1974 whether the suit was maintainable at all by an unregistered firm. Realising the impasse and difficulty in the matter, the plaintiff-respondent filed an application for an amendment in October, 1976. The amendment was sought for in the following terms:

"1. Cause title. ...	P. Balasubramanian, proprietor M/s. Aruna & Associates Plaintiff.
2. Para one of the plaint ..	The plaintiff, P. Balasubramanian is the son of R. Panchapakesan, Hindu, aged about 42 years, carrying on business as proprietor, Messrs. Aruna and Associates and is residing at No. 163-V, Royapettah High Road, Madras-4.
3. Verification ..	I, P. Balasubramanian, son of R. Panchapakesan, Hindu, aged about 42 years, proprietor of M/s. Aruna and Associates do hereby declare that the facts stated above in paras 1 to 8 are true and correct and sign this verification at Madras on this day of 1976.

4. It is seen, therefore, that by seeking for an amendment of the plaint, Mr. P. Balasubramanian wanted to get himself on record as the proprietor of M/s. Aruna and Associates. This action was resisted by the petitioner-defendant on the ground that no such amendment can be sought for or allowed under Order 6, rule 17, Civil Procedure Code as it will totally change the cause of action and also on the ground that the suit as originally instituted was an incompetent one and such a suit which cannot be maintained cannot be sustained further by an amendment as asked for. The lower Court, however, accepted the plaintiff's contention that the amendment was possible and it allowed the application on costs. It is as against this, that the present Civil Revision Petition has been filed.

5. Mr. Harikrishnan, learned counsel for the defendant-petitioner, takes up the preliminary objection that the application for amendment ought not to have been entertained at all since it is not in dispute that the original suit which was brought into the portals of the Court was by a partnership which was not registered under the Partnership Act and that therefore, under section 69 (2) of the Partnership Act, the suit was not maintainable as the mandate therein is so clear and emphatic. The additional ground is that law cannot be circumscribed by a bare allegation and the entire phase of the suit changed by stating that the present plaintiff who has to contest the matter and prosecute the suit is a person who is the proprietor of the quondam partnership firm after it was dissolved in 1972. Answering this, Mr. Srivastamani says that what is sought for by the plaintiff, may be at a belated stage, need not be accepted at its face value and that no prejudice would be caused to the plaintiff if the amendment is allowed subject to a privilege being granted to the defendant to challenge the plaintiff to establish that there was a dissolution in

February, 1972, and that it was only a mistake which crept into the pleadings.

6. A suit filed by an unregistered partnership should even at the threshold be deemed to be an action *non est* in the eye of law because of the specific mandate under section 69 (2) of the Partnership Act, section 69 (2) reads:

> "No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm".

This compulsion, which is in the nature of statutory mandate cannot be avoided in any manner. Messrs. Aruna and Associates come to this Court alleging that it was a partnership firm of engineers and contractors. Later, they had to confess that it was an unregistered firm. Therefore, the suit which they brought into Court was one which was directly violative of the mandate under section 69 (2) of the Partnership Act. The mandate contained in section 69 (2) is so assertive that it says that no suit shall be brought in by an unregistered firm. Such being the prescription, it should be presumed that such an action brought into Court by Messrs. Aruna and Associates though knowing it was an unregistered firm as it is a partnership firm has to be ignored and has to be treated as non-existent.

7. The learned counsel for the respondent, however, relied upon a decision of our Court in *Md. Abdul Samad* v. *Madarsa Rowther*[1], the ratio in which says that a dissolved firm can bring in a suit in the name of the quondam firm or a partner of the dissolved firm can possibly bring up such an action.

8. The question though in the first instance appeared to be so simple as one governed by the principle in the above decision yet, in view of the pleadings the above decision does not apply to the facts of this case. In this case, it was asserted in the plaint that there was a partnership which was proved to be an unregistered partnership, and appeared to be one. In view of section 69 (2) such a suit filed by an unregistered partnership is no suit at all in the eye of law and hence I characterised it as a *non est* action. But in the case decided by Subrahmanyan, J., in the above case, it was brought out that a dissolved firm after dissolution filed a suit in its own name and contended that any such attitude is not irreconcilable with the mandate in section 69 (2) and that notwithstanding the directive in section 69 (2), the dissolved firm can bring an action in its own name. But the position is entirely different in the instant case. Though the dissolution is said to have happened in February, 1972, there was not a whisper about it in the pleadings. On the other hand, it was stated on verification that Messrs. Aruna and Associates was a partnership firm which later turned out to be an unregistered firm. On an objection taken by the defendant in 1974, the application for amendment was filed in 1975 wherein an allegation is made that the above partnership firm was dissolved in 1972. Such a belated attempt ought not to be encouraged. Even otherwise, if the amendment was in line with the ratio of the decision in *Md. Abdul Samad* v. *Madarsa Rowther*[1], and if the amendment by the plaintiff was to the effect that they wanted to allege that though the suit was instituted in the firm's name which was a dissolved firm and a suit by the dissolved firm being maintainable as per the decision as above, the amendment might be allowed. But what was attempted by the petitioner who sought for, an amendment was that he wanted to just come on record as the proprietor of the firm and not as a person who took over the assets of a dissolved partnership. Matters might have been different if such was the attempt. For, the proposition that a suit which was originally ushered into the Court by an unregistered partnership cannot be converted into a suit as if it was instituted by a person as proprietor thereof and is incompetent is the ratio in the decision in *Chunilal* v. *Ahmed Rowther*[2]. The essential principle behind such actions and decisions is obvious. A person cannot approbate and reprobate. When once he takes up a stand that it is a partnership firm, he

1. (1959) 1 M.L.J. 309: 72 L.W. 313: I.L.R. (1959) Mad. 802: A.I.R. 1959 Mad. 440.

1. (1959) 1 M.L.J. 309: 72 L.W. 313: I.L.R. (1959) Mad. 802.
2. A.I.R. 1960 Ker. 159.

should stand by it. Once he takes up the position that it is a dissolved firm, equally he should be prepared to substantiate it. But he cannot have a third way out of it by bringing in a person who was a quondam partner of the unregistered firm as if he has become the proprietor thereto on dissolution. This metamorphosis is not available in law. The Court below did not recognise this material change in the pleadings if the amendment was to be allowed. In this sense, therefore, the order is in excess of the jurisdiction of the Court below besides suffering from a material irregularity. The Civil Revision Petition is, therefore, allowed. No costs.

S.J. ——— *Petiton allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Natarajan, J.*

G. Jagadesh Chandran .. *Petitioner**

v.

The State of Tamil Nadu represented by the Secretary to Government, Revenue Department, Madras and others

.. *Respondents.*

Tamil Nadu Urban Land Tax Act (XII of 1966)—Assessment to tax and appeal—Value of urban land—Sale deeds produced by petitioner rejected assessing and appellate authorities—Appellate order quashed.

In proceedings before the Urban Land Tax Officer the assessee had produced five sale deeds cited by him for fixation of the market value of the lands concerned. The officer rejected the documents without giving proper reasons, and the Appellate Authority did not even advert to them. On a petition to quash the order of the appellate authority,

Held: Though the second respondent (assessing authority) had considered the documents filed by the petitioner, he had not given reasons for rejecting all the documents. As far as the third respondent (appellate authority) was considered, there was no reference about the genuineness of the sale deeds produced by the petitioner or about the correctness of the sale prices mentioned therein. Applying the ratio laid down in *M/s. Southern Roadways Ltd.* v. *Assistant Commissioner, Urban Land Tax*, (1978) 1 M.L.J. 115: 92 L.W. 8, it followed that the order of the third respondent could not be considered as one passed properly by the Tribunal in exercise of its statutory powers as an appellate body. Therefore, the order of the third respondent would stand quashed. [*Paras.* 5 *and* 6.]

Case referred to:—

M/s. Southern Roadways Ltd. v. *Assistant Commissioner Urban Land Tax,* (1978) 1 M.L.J. 115: 92 L.W. 8.

Petition under Article 226 of the Constitution praying the High Court to issue a writ of *certiorari* calling for records in 37 to 39-B 17/W. 1 A.P.M. etc., on the file of the Assistant Commissioner, Urban Land Tax, Coimbatore, etc., and quash the same.

K. Venkataswami and *A. Sivaji,* for Petitioner.

C. Chinnaswami, for Government Pleader, for Respondents.

The Court made the following

ORDER.—This writ petition relates to assessment proceedings against the petitioner under the provisions of the Urban Land Tax Act.

2. The second respondent fixed the value of the Urban properties of the petitioner at Rs. 31,200 per ground for the land comprised in T.S. Nos. 1015 and 1016 and at Rs. 27,500 per ground for the land situate in T.S. No. 1017 of Ward I, Block 17, Coimbatore village, Coimbatore taluk. Yet another item, *i.e.*, the land comprised in T.S. No. 596/3 in Ward II, Block 25, of the same village was valued at Rs. 12,000 per ground. The petitioner appealed to the third respondent, which is the Statutory Appellate Authority, against the order of assessment. The third respondent allowed the appeal in part and fixed the market value for T.S. Nos. 1015 and 1016 at Rs. 26,500 per ground, for T.S. No. 1017 at Rs. 20,500 per ground and for T.S. No. 596/3 at Rs.9,600 per ground.

* W.P. No. 4546 of 1976. [11*th September,* 1978.

3. The petitioner seeks quashing of the orders of the respondents on the ground that the second respondent has not given valid reasons for rejecting the sale deeds cited by him for fixation of the market value of the lands and the third respondent has not at all considered or even adverted to the documents filed by him.

4. The petitioner had produced the five sale deeds before the second respondent in support of his contention that the sale prices recited in them represented the correct market value of urban property in the areas where his lands are situate and, therefore, the properties should be assessed on the basis of the figures contained in those sale deeds. The second respondent rejected the documents and has given reasons for rejecting some documents alone. With reference to the other documents, he has merely stated that they were considered in other cases and held unacceptable, and, therefore, he was eschewing those documents from consideration in the petitioner's case also. As far as the third respondent is concerned, it has not made any reference to the documents produced by the petitioner in support of his contentions. On account of these laches, the petitioner's counsel, Mr. Sivaji, argues that the two statutory authorities, *viz.*, the second and third respondents, have not discharged their statutory duties and quasi-judicial functions properly and hence their orders have to be quashed. In support of this contention, he relies upon *Messrs. Southern Roadways Ltd.* v. *Asst. Commissioner, Urban Land Tax*[1]. He also quotes two other unreported judgments in this behalf, *viz.*, *Ramachandran* v. *Agricultural Income-tax Officer*[2], *Raman* v. *Board of Revenue*[3] and *Shanmugham Pillai* v. *State of Tamil Nadu*[4].

5. On a consideration of the matter, I find the grievance of the petitioner to be well-founded. Though the second respondent has considered the documents filed by the petitioner, he has not given reasons for rejecting all the Documents. For example, he has rejected Document No. 720 of 1971, and Document No. 413 of 1971 (items (ii) and (vi) in the list of documents produced by the petitioner as unworthy of consideration as they had already been rejected when considering the value to be fixed for the lands situated in Block 20 of Ward I. Admittedly, the petitioner was not a party to those assessment proceedings. Therefore, the petitioner could not know the grounds on which the two documents were rejected by the second respondent when completing the assessment proceedings for the lands situate in Block 20 of Ward I. As far as the third respondent is concerned, there is no reference about the genuineness of the sale deeds produced by the petitioner or about the correctness of the sale prices mentioned therein. In such circumstances, the ratio laid down in *M/s. Southern Roadways Ltd.* v. *Asst. Commissioner, Urban Land Tax*[1], will clearly be attracted to the petitioner's case. In the above said case, Ramanujam, J. has held as follows:

> "The Assessing Authority being a statutory body cannot arbitrarily, without any reason reject the sale deeds of lands which are admittedly situate in and around the locality, where the lands in question are situate. If the Assessing Authority ignores certain sale deeds merely on the ground that they do not represent the correct market price, it gives an impression that since the price referred to in the sale deeds does not suit his valuation, he is ignoring them. That is not the proper approach to be made. Each one of the documents has to be considered to find out whether the sale deed can be taken as the proper basis for ascertaining the market value of the disputed land. If the statutory Appellate Authority fails to consider a relevant material placed before it, the disposal of the appeal cannot be said to be proper or judicial. Since the Tribunal has failed to consider the relevant documents filed and referred to by the petitioner both before the assessing officer and before the Tribunal, the appellate order cannot be legally sustained."

6. Applying the ratio stated above, it follows that the order of the third respondent

1. (1978) 1 M.L.J. 115: 92 L.W. 8.
2. W.P. No. 3816 of 1976.
3. W.P. No. 3817 of 1976.
4. W.P. No. 4073 of 1976.

1. (1978) 1 M.L.J. 115: 92 L.W. 8.

cannot be considered as one passed properly by the Tribunal in exercise of its statutory powers as an appellate body. Therefore, the order of the third respondent will stand quashed and the matter, will be remitted to the third respondent for fresh disposal of the appeal in the light of the directions contained in this judgment. There will be no order as to costs.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Employees State Insurance Corporation, represented by its Regional Director, Madras .. *Appellant**

v.

Bharat Pulverising Mills (P.) Ltd., represented by the Manager, C. L. Patak .. *Respondent.*

Employees' State Insurance Act (XXXIV of 1948), *section* 2 (9) (ii) (13), (22)—*Employer's liability for payments to contractors regarding work done through medium of another employer despite absence of direct relationship as master and servant between principal employer and workers—Attendance bonus, incentive payments and payments to casual workers held not "wages"— Payment to contract workers held to be wages.*

The respondent-company filed a petition before the Employees' State Insurance Court for a declaration that the payments like attendance bonus, incentive payments, payment to contractors for contract work done and casual payments are not wages within section 2 (22) of the Employees' State Insurance Act, 1948. The Court held that these payments are not wages and therefore, there was no liability on the part of the respondent to make the contribution as demanded. On appeal by the Employees' State Insurance Corporation to the High Court,

Held: As regards the three categories, *viz.*, attendance bonus, incentive payments and payments to casual workers, there was no difficulty in accepting the judgment of the Court below. [*Para.* 4.]

However, the payment to contract workers stood on an entirely different footing on a careful reading of section 2 (9) (ii) and (13), it was clear that notwithstanding the fact that the workers work through the medium of another employer and notwithstanding the further fact that there was no direct relationship between the principal employer and the ultimate workers as master and servant, the Act takes in these workers employed through the medium of some other employer, though not by the principal employer. Otherwise, the provisions of the Act would easily be defeated by the principal employer by enlisting workers through the medium of contractors. From this point of view, the High Court could not agree with the fisding of the lower Court in this regard. [*Para.* 6.]

Appeal against the order of the Employees' State Insurance Court (City Civil Court), Madras in E.I.O.P. No. 13 of 1974.

S. M. Ali Mohamed, for Appellant.

P. V. Marthandam and *P. Vijayakumar*, for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Miscellaneous Appeal raises an interesting question as to the liability of the respondent in the Civil Miscellaneous Appeal, *viz.*, the Bharat Pulverising Mills (P.) Ltd., No. 1074, T.H. Road, Madras-19, to make necessary contribution under the Employees' State Insurance Act, 1948 (hereinafter referred to as the Act). By letter, dated 19th March, 1974, the appellant called upon the respondent to make the contributions under the Act in respect of attendance bonus, incentive payments, payments to contractors and certain allowances, and petty cash payments of a casual nature. The respondent objected to the demand. Thereafter, the Revenue Recovery Act was set in motion, and the contributions due on the above accounts were sought to be recovered. This necessitated the respondent to file a petition under section 75 (1) of the Act,

* A.A.O. No. 534 of 1976. 17*th October*, 1978.

for a declaration that the payments like attendance bonus, incentive payments, payment to contractors for contract work done and casual payments are not wages within section 2 (22) of the Act and for a declaration that the respondent is not liable to pay contribution as demanded. The matter came up before the learned First Additional Judge, constituting the Employees' State Insurance Court, Madras, under section 74 of the Act. The Court held that these payments are not wages, and therefore, there was no liability on the part of the respondent to make the contribution as demanded. It is against this the Employees' State Insurance Corporation has preferred the appeal.

2. Mr. S. M. Ali Mohamed states that the judgment of the Court below is liable to be set aside. According to him, all these four categories of payments would fall within the definition of "wages" and, consequently the Act is attracted. In any event, according to the learned counsel, having regard to the comprehensive definition of the word 'employer' as laid down in section 2 (9) (ii) read with section 2 (13) of the Act, albeit the fact that these contract workers are employed through the medium of another employer, the liability to contribute by the respondent cannot be avoided. The Court below erred in holding that because of the medium of employment through the contractor there is no relationship of master and servant, and consequently, there is no liability to contribute.

3. Mr. P. V. Marthandam, learned counsel for the respondent, in supporting the judgment of the Court below, states that attendance bonus, incentive payments and payments made to casual workers do not form part of section 2 (22), and, therefore, they are not wages since the terms of the contract of employment neither expressly nor impliedly contemplate such payments. As regards the contract workers his submission is that because the employment is through the immediate employer and there being no privity of contract between the principal employer and the ultimate workers, the judgment can be sustained.

4. As regards the three categories, *viz.*, attendance bonus, incentive payments and payments to casual workers, I see no difficulty in accepting the judgment of the Court below.

5. Section 2 (22) of the Act defines 'wages' thus—

> " 'Wages' means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lockout, strike which is not illegal or lay off and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include—(*a*) any contribution paid by the employer or to any pension, fund or provident fund, or under this Act; (*b*) any travelling allowance or the value of any travelling concession; (*c*) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or (*d*) any gratuity payable on discharge."

The terms of the contract of employment neither expressly nor impliedly require these payments. In other words, they are not comprehended within those terms of employment. However, the payment to contract workers stands on an entirely different footing. In this case, the admitted facts are that the workers are employed through an intermediary. It is for this specific purpose, section 2 (9) (ii) provides thus:

> "(9) 'employee' means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and ....(*ii*) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; .... and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of materials for, or the distribution or sale of

the products of, the factory or establishment; but does not include—(*a*) any member of the Indian Naval, Military or Air Forces; or (*b*) any person so employed (whose wages excluding remuneration for overtime work) exceed one thousand rupees a month".

In this connection, it is also necessary to advert to section 2 (13) of the Act, which runs as under:—

"'immediate employer' in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer";

6. On a careful reading of the above provisions, it is clear that notwithstanding the fact that the workers work through the medium of another employer and notwithstanding the further fact that there is no direct relationship between the principal employer and the ultimate workers, as master and servant, the Act takes in these workers employed through the medium of some other employer though not by the principal employer. Otherwise, the provisions of the Act would easily be defeated by the principal employer by enlisting the workers through the medium of contractors. From this point of view, I am unable to agree with the finding of the lower Court in this regard. Therefore, I hold that as far as the contract workers are concerned, the Act does apply. But, it is a totally different matter as to how the benefits of the Act could be made applicable to these workers and what exactly is the liability of the employer to contribute as far as the workers are concerned. These are matters which require to be agitated before the authority concerned, and I grant liberty to the respondent to raise whatever objections are available to it in this regard.

7. Accordingly, this Civil Miscellaneous Appeal is allowed in part; *viz.*, in so far as it relates to the contract workers, and is dismissed in other respects. There will be no order as to costs.

S.J. ——— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Alamelu ***alias*** **Chinnakannammal and others** .. *Petitioners**

v.

Manickkammal .. *Respondent.*

(A) *Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), section 40—Applicability — Plaintiff alleging affixing of thumb impression on blank papers to be used for writing will—Document found to be a settlement—Objection to registration—Document compulsorily registered—Suit by plaintiff for declaration of title to the properties and for injunction.*

(B) *Suit valued at Rs. 1,300 and court-fee due thereon paid court-fee paid whether proper.*

Held, that having regard to the way in which the suit had come to be filed in the present case, it was clear that the plaintiff did not admit at any time that the document was executed by her or that she was a party to the document. Her case was that it was a forged one. Forged documents would not confer title on any person and it would be unnecessary to get such a document set aside in order to succeed in the prayer for declaration. The payment of court-fee is to be adjudged on the plaint allegations. Whether the allegation of forgery is correct or not will have to be gone into in the suit. The suit was properly valued. [*Para.* 7.]

Cases referred to:—

M. Ct. Muthiah v. *The Deputy Collector of Estate Duty* (1964) 1 M.L.J. 278; *Desari Nagabhushanam* v. *Kunameeni Venkatap-*

* C.R.P. No. 1192 of 1976. *12th December,* 1978.

payya, (1935) 68 M.L.J. 95: I.L.R. 58 Mad. 448: 41 L.W. 90: A.I.R. 1935 Mad. 203.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Krishnagiri, dated 8th April, 1976 and made in O.S. No. 221 of 1974.

V. Krishnan, for Petitioner.

T. R. Rajagopalan, for Respondent.

The Court made the following

ORDER.—This Civil Revision Petition has been filed against the order of the learned District Munsif of Krishnagiri in O.S. No. 221 of 1974 dated 8th April, 1976. The plaintiff is the sister of the first defendant. The second defendant is the husband of the first defendant and the third defendant is the brother of the second defendant. The suit property belonged to the plaintiff and it was in the occpation of a nephew of her father-in-law. According to her, she could not recover possession inspite of her obtaining a decree. It was stated that the first defendant suggested to her to make appropriate provision in his favour in respect of the suit properties so that his sons would get possession of the properties at least after her lifetime. The plaintiff agreed to this arrangement and she claimed that she affixed her thumb impression on certain blank papers on the basis that the said blank papers would be used for writing a will in the manner contemplated by the parties. However, when the document came to be presented for registration in the Sub-Registrar's Office, she came to know that the first defendant had written a settlement instead of a will and therefore she refused to register the said document. The document was subsequently compulsorily registered and therefore she came forward with the present suit for declaration of her title and for permanent injunction restraining the defendants from interfering with the plaintiff's possession and enjoyment of the suit properties. Objection was taken to the Court-fee paid. The suit was valued at Rs. 1,300 and the Court-fee due thereon was accordingly paid. Objection was raised to the payment of Court-fee in the said manner on the ground that the document itself would show that the market value of the property was Rs. 20,000 that the suit should have been valued at that figure and that the District Munsif's Court would have no jurisdiction to try the suit. Parties consented to the issues regarding Court-fee and maintainability of the suit being tried as preliminary issues and the learned District Munsif held after hearing the parties that since the plaintiff pleaded forgery of the document, it should be construed that she was not a party to the document and that she need not get it set aside. He therefore held that the Court-fee paid was proper and that he had jurisdiction to try the suit.

2. It is against this judgment of the learned District Munsif that the present revision petition had been filed. The learned counsel for the defendants-petitioners submitted that this is a case which would come within the scope of section 40 of Tamil Nadu Court-fees and Suits Valuation Act and that accordingly the Court-fee paid would not be proper. The learned counsel for the respondent plaintiff submitted that this is a case where the document was a forged one and did not and could not pass any title to the properties and that it need not be set aside. The contention urged was that section 40 of the Court-fees Act did not apply to the present case.

3. Section 40 so far as it is material runs as follows:

> "In a suit for cancellation of a decree for money or other property having a money value or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest in money, moveable or immoveable property, fee shall be computed on the value of the subject-matter of the suit and such value shall be deemed to be if the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or other document was executed".

The question that arises for consideration is whether this is a case where the suit is for cancellation of a document which purports or operates to create any right or title in immovable property. A perusal of the plead-

ings would show that it is not a suit for setting aside the particular document under consideration. However, the learned counsel for the petitioner submits that without getting rid of the document, the plaintiff would not be in a position to succeed and that therefore the suit should have been valued on the basis of section 40 of the Tamil Nadu Court-fees and Suits Valuation Act.

4. I had occasion to consider a similar question, though on somewhat different facts in *Kuppurama Mudaliar* v. *State of Tamil Nadu by Collector of North Arcot*[1]. In that case, the suit was as a sequel to sale by the Revenue authorities under the Revenue Recovery Act realisation of certain loans. The contention was that the sale was null and void. The plaintiff, therefore, paid Court-fee under section 25 (*d*) of the Court-fees Act. The Court-fee examiner gave a check-slip pointing out that the proper provision under which the Court-fee should have been paid was section 10 (1). The trial Court held that the plaintiff had to value the suit under section 40 and seek also a prayer for cancellation of the revenue sale. My attention was then drawn to a few decisions, one of which was the one reported in *M. Ct. Muthiah* v. *The Deputy Controller of Estate Duty, Southern Zone, Madras*[2], which was cited in the present case also. After considering this and other decisions, the view expressed by me was that if the relief could not be granted without the removal of the deed or decree to which the plaintiff was a party, then he must get the deed or decree set aside or declared void and that where the plaintiff was not a party to the document or decree it would not be possible for him to have it set aside in which case, he could ignore it. Causes where the illegal character of the transaction was writ large on it as for example a minor who had deliberatelv dealt with the property as if he was a major, were considered to stand on a different footing. However, in that particular case, without getting the revenue sale cancelled, the plaintiff could not have established his title to the property and therefore it was held that the suit should have been valued in the manner contemplated by section 40 of the Court-fees Act.

1. C.R.P. No. 1060 of 1978 dated 25th Angust, 1978.
2. (1964) 1 M.L.J. 278.

5. The learned counsel for the respondent sought to distinguish this decision by contending that in the present case, the document itself could not have conveyed any title to the property, because, it was contended to be a forged one. In such a case, according to the learned counsel, the decision in *Dasari Nagabhushanam* v. *Kunameeni Venkatappayya*[1], would apply. In that case, the plaintiff alleged that a sale deed was forged by the defendant and in spite of his objection the Registrar directed its registration and he therefore prayed that the instrument may be declared to be a forgery and the costs incurred in the registration enquiry be refunded to him. The trial Court in that case took the view that the suit should have been valued in accordance with section 7 (*iv*-A) of the Court-fees Act then in force. Under that provision, in a suit for cancellation of a decree for money or other property the suit would have to be valued on the basis of the value of the property for which the document was executed. The learned Judge held that in scuh a case the only relief, the plaintiff could ask for was for a declaration and the prayer for cancellation would be quite inappropriate. At page 96, it was stated as follows:

> "The question then really is, when a person alleges that a forged instrument has been brought into existence as if he were a party to it, does the law cast upon him a duty to have it cancelled or set aside by suit? There are two statutory provisions which show that a suit for declaration lies. (1) Section 39 of the Specific Relief Act, Illustration (*b*) to that section contains an express reference to forged instruments; and (2) Article 92 of the Limitation Act refers to Suits, "to declare the forgery of an instrument issued or registered". While the law thus entitled a person to sue to have the document adjudged a forgery, does it compel him or make it obligatory upon him to get it cancelled or set aside".

1. (1935) 68 M.L.J. 95 : I.L.R. 58 Mad. 448 : 41 L.W. 90 : A.I.R. 1935 Mad. 203.

6. After referring to the authorities cited, the learned Judge came to the conclusion that the only relief that the plaintiff can ask for is that of declaration and that a prayer for cancellation would be quite inappropriate.

7. Having regard to the way in which the suit has come to be filed in the present case, it is clear that the plaintiff did not admit at any time that the document was executed by her or that she was a party to the document. Her case is that the document was a forged one. Forged documents would not confer title on any person and it would be unnecessary to get the document set aside in order to succeed in the prayer for declaration. The payment of Court-fee is to be adjudged on the plaint allegations. Whether the allegation of forgery is correct or not will have to be gone into in the suit. Nothing in this judgment will be taken as concluding that issue. In the circumstances of this case, I am satisfied that the suit was properly valued and the civil revision petition is accordingly dismissed. No order as to costs.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

Mrs. J. Kasthuri and others .. *Petitioners**

v.

Seth Ghanshamdas Vonsimal Deva Bank .. *Respondent.*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), *sections* 25 (d) *and* 40—*Suit for declaration—Three documents styled as hundies duly signed by plaintiffs given to defendant to accommodate the first defendant —Subsequent discovery by plaintiffs of collusion and conspiracy to mulct them with liability—Suit for a declaration that the hundies were invalid and inoperative—Proper Court-fee payable.*

The petitioners, who were the plaintiffs in the suit, stated that one '*G*' introduced one '*L*' of the first defendant firm to them, that the said '*L*' became an intimate friend of the second plaintiff, that the said '*L*' represented that he would require hundies for the purpose of accommodation to enable him to discount with third parties and raise monies thereon for the purpose of his business, that the said '*L*' also assured the plaintiffs that he would himself make the necessary arrangements for the honouring of the hundies on the due dates and that no liability would be fastened upon the plaintiffs and that he had facilities with the second defendant for accommodation to the extent of Rs. 50,000. The plaintiffs further stated that to oblige the first defendant they gave three documents styled as hundies duly signed by them, that no dates or other particulars were mentioned in those documents except the signatures and addresses of each of the plaintiffs in each of the documents, that the suit documents were not supported by consideration at all and that they were intended to accommodate the first defendant. The plaintiffs alleged that the defendants had colluded and conspired together with the *mala fide* intention of mulcting liabi-

* C.R.P. No. 3654 of 1976. 11*th January*, 1979.

lity on the plaintiffs and threatened to take action against them in respect of the aforesaid hundies, that the conduct of the defendants was thoroughly *mala fide* and fraudulent, and collusive, the plaintiffs were being cheated by the defendants compelling them to part with large sums of money as though fall consideration was paid under each of the hundies; and hence it had become necessary to institute the suit for a declaration that the three hundies were invalid and in-operative. On the question of Court-fee payable,

Held: For the purpose of determining the Court-fee payable, it is the substance of the relief that a plaintiff prays for that has to be taken into account and not the technical form of the prayer. Otherwise, mere astuteness and ingenuity of the person drafting the plaint will have the effect of not only camouflaging and disguising the real relief which a plaintiff claims in a suit but also nullifying and defeating the provisions of law dealing with the payment of Court-fee based on the nature of the relief litigants seek in a Court of law.

[*Para.* 4.]

It is clear that the plaintiffs in the present case having executed the hundies, they will have to have those hundies cancelled or set aside and for that purpose they will have to pay Court-fee under section 40 of the Tamil Nadu Court-fees and Suits Valuation Act. By merely couching the prayer in the form of a declaratory relief, the plaintiffs cannot avoid the reality of the situation, namely, that they are challenging the hundies executed by them on the ground that they were not supported by consideration and they were obtained by misrepresentation or fraud.

[*Para.* 10.]

Cases referred to:—

Mt. Zeb-ul-Nisa v. *Chaudhiri Din Mohammad*, A.I.R. 1941 Lah. 97 (F.B.); *Sohindar Singh* v. *Shankar* Das, A.I.R. 1936 Lah. 166; *Prithvi Raj* v. *D. C. Ralli*, A.I.R. 1945 Lah. 13; *Vinayak Rao* v. *Mankunwarbai*, A.I.R. 1943 Nag. 70; *Shamsher Singh* v. *Rajindar Prashad*, (1974) 1 S.C.J. 270: A.I.R. 1973 S.C. 2384; *Faqir Chand* v. *Harnam Kaur*, (1967) 2 S.C.J. 811: (1967) 1 S.C.R. 68: A. I. R. 1967 S. C. 727; *Gopalakrishna Iyengar* v. *P. Srirengammal*, (1964) 1 M.L.J. 278; *R. Muthammal* v. *Narmada*, (1975) 2 M.L.J. 304: 88 L.W. 678: A.I.R. 1976 Mad. 183; *R. D. Somasundaram Pillai* v. *S. Janaki Ammal*, (1955) 1 M.L.J. 310.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the IV Assistant Judge, City Civil Court, Madras, dated 25th September, 1976 and made in O.S. No. 4390 of 1973.

T. P. Radhakrishnan, for Petitioners.

Additional Government Pleader on behalf of the State.

The Court made the following

ORDER.—This is a petition to revise the order of the learned IV Assistant Judge, City Civil Court, Madras, dated 25th September, 1976 directing the petitioner herein who were the plaintiffs in O.S. No. 4390 of 1973 to pay court-fees under section 40 or the Tamil Nadu Court-fees Act, 1955 hereinafter referred to as the Act. The petitioners herein who were the plaintiffs in the suit stated that one Ghanshamdas Chaturbuj introduced one B. E. Loungani of the first defendant firm to them, that the said Loungani became an intimate friend of the second plaintiff (second petitioner herein), that the said Loungani represented that he would require hundies for the purpose of accommodation to enable him to discount with third parties and raise monies thereon for the purpose of his business, that the said Loungani also assured the plaintiffs that he would himself make the necessary arrangements for the honouring of the hundies on the due dates and that no liability would be fastened upon the plaintiffs and that he had facilities with the second defendant for accommodation to the extent of Rs. 50,000. The plaintiffs further stated in the plaint that to oblige the first defendant they gave three documents styled as hundies duly signed by them, that no dates or other particulars were mentioned in those documents stated to be hundies except the signatures and addresses of each of the plaintiffs in each of the documents, that the said documents were not supported by consideration, at all and that they were intended to accommodate the first defendant. However, according to the plaintiffs, the defendants colluded and conspired together and with the *mala fide* intention of mulcting liability on the plaintiffs threatened

to take action against them in respect of the aforesaid hundies, the conduct of the defendants was thoroughly *mala fide* and fraudulent and collusive; the plaintiffs were being cheated by the defendants compelling them to part with large sums of money as though full consideration was paid under each of the hundies; and hence it has become necessary to institute the suit for a declaration that the three hundies were invalid and inoperative. On the basis of these averments the plaintiffs prayed for a decree:

(1) declaring that the three documents styled as hundies for Rs. 5,000 each falling due on 30th May, 1973, 2nd July, 1973 and 2nd June, 1973 respectively in favour of the first defendant are invalid inoperative and void; and

(2) for costs.

2. Among other defences, one defence taken by the first defendant was that the court-fee should have been paid under section 40 of the Act and that the plaintiffs could not have valued the suit and paid the court-fee under section 25 (*d*) of the Act.

3. The learned IV Assistant Judge accepted the contention of the first defendant in this behalf and held that the plaintiffs had to pay court-fee under section 40 of the Act and not under section 25 (*d*) of the Act and gave time to the plaintiffs to pay the court-fee under section 40 of the Act. It is this order that is challenged in the present civil revision petition.

4. Section 25 of the Act deals with suits for declaration. After dealing with suits for declaration and for possession of the property in clause (*a*) and for declaration and consequential injunction with reference to immoveable property in clause (*b*) and for declaration in relation to the exclusive right to use, sell, print or exhibit any mark, name, book, picture, design or other thing in clause (*c*), it provides in clause (*d*) follows:—

"In other cases, whether the subject-matter of the suit is capable of valuation or not, fee shall be computed on the amount at which the relief sought is valued in the plaint or on rupees four hundred whichever is higher".

Section 40 of the Act deals with suits for cancellation of decrees, etc., and section 40 (1) reads as follows:—

"In a suit for cancellation of a decree for money or other property having a money value, or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property, fee shall be computed on the value of the subject-matter of the suit, and such value shall be deemed to be.

If the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or other document was executed;

If a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property".

I have already referred to the averment contained in the plaint and the prayer of the plaintiffs. It is true that the prayer is in the form of a declaration. But the real question for consideration is, whether it is the form of the prayer that determines the court-fee payable or it is the substance of the relief which the plaintiff prays for that determines the court-fee payable. There can be no doubt whatever that for the purpose of determining the court-fee payable, it is the substance of the relief that a plaintiff prays for that has to be taken into account and not the technical form of the prayer. If it is to be otherwise, mere astuteness and ingenuity of the person drafting the plaint will have the effect of not only camouflaging and disguising the real relief which a plaintiff claims in a suit but also nullifying and defeating the provisions of law dealing with the payment of court-fee based on the nature of the relief litigants seek in a Court of law.

5. In *Mt. Zeb-ul-Nisa and others* v. *Chaudhiri Din Mohammad and others*[1], the plaintiff had sued for a two-fold declaration (*i*) that the property described in the plaint was a wakf, and (*ii*) that certain alienations

1. A.I.R. 1941 Lah. 97 (F.B.).

thereof by the mutawalli and his brother were null and void and were ineffectual against the waqf property. It was held that the second part of the declaration was tantamount to the setting aside or cancellation of the alienations and therefore, the relief claimed could not be treated as a purely declaratory one and inasmuch as it could not be said to follow directly from the declaration sought for in the first part of the relief, the relief claimed in the case could be treated as a declaration with a consequential relief. It was pointed out in that case that in deciding whether a suit is purely declaratory, the substance and not merely the language or the form of the relief claimed should be considered. The Court observed:

"It seems to me that neither the answer to the question whether the plaintiff is or is not a party to the decree or the deed sought to be declared as null and void, nor to the question whether the declaration sought does or does not fall within the purview of section 42, Specific Relief Act, furnishes a satisfactory or conclusive test for determining the court-fee payable in a suit of this description. When the plaintiff is a party to the decree or deed, the declaratory relief, if granted, necessarily relieves the plaintiff of his obligations under the decree or the deed, and, hence it seems to have been held in such cases, that the declaration involves a consequential relief. In cases where the plaintiff is not a party to the decree or the deed, the declaratory relief does not ordinarily include any such consequential relief. But there are exceptional cases in which the plaintiff though not a party to the deed or the decree is never-the-less bound thereby. For instance, when a sale or mortgage of joint family property is effected by a manager of a joint Hindu family, the alienation is binding on the other members of the family (even if they are not parties to it) until and unless it is set aside. Similarly, a decree passed against the manager will be binding on the other members of the family. If therefore a coparcener sues for a declaration that such an alienation or decree is null and void, the declaration must, I think, be held to include consequential relief in the same way as in those cases in which the plaintiff is himself a party to the alienation or the decree, which is sought to be declared null and void. The case dealt with in *Sohindar Singh* v. *Shankar Das*[1], seems to have been of this description. The case of an alienation by a mutawalli of waqf property would also appear to stand on a similar footing. In the case of waqf property, it is only the trustee or the mutawalli who can alienate the property. If he makes an alienation it is binding on all concerned, until and unless it is set aside. If therefore a person sues to get such an alienation declared null and void, he can only do so by getting the deed invalidated. The relief claimed in such cases also may therefore be found to include a consequential relief".

6. In *Prithvi Raj and another, minors under guardianship of Mt. Tehl Kaur* v. *D. C. Ralli and others*[2], it was held that in a suit by the son for a declaration that the mortgage decree obtained against his father was not binding upon him, it is essential for the son to ask for setting aside of the decree as a consequence of the declaration claimed and to pay *ad valorem* court-fee under section 7 *(iv)* *(c)*. It was also pointed out that a decree against the father is a good decree against the son and unless the decree is set aside it would remain executable against the son, and it was essential for the son to ask for setting aside the decree. In *Vinayakrao* v. *Mankunwarbai*[3], it was held that in a suit by the son for a declaration that decree against the father does not affect his interests in the family property, consequential relief is involved and *ad valorem* court-fee would be necessary.

7. All these decisions were referred to and approved by the Supreme Court in *Shamsher Singh* v. *Rajindar Prashad and others*[4]. In that case, on 13th July, 1962, the father executed a mortgage deed in favour of the appellant of a property of which he claimed to be the sole owner for a sum of Rs. 16,000.

1. A.I.R. 1936 Lah. 166.
2. A.I.R. 1945 Lah. 13.
3. A.I.R. 1943 Nag. 70.
4. (1974) 1 S.C.J. 270: A.I.R. 1973 S.C. 2384.

The mortgagee, the appellant, filed a suit on the foot of this mortgage and obtained a decree. When he tried to take out execution proceedings for the sale of the mortgaged property, respondents 1 and 2 before the Supreme Court filed a suit for a declaration that the mortgage executed by their father in favour of the appellant was null and void and ineffectual as against them as the property was a joint Hindu family property, and the mortgage had been effected without consideration and family necessity. On this plaint the plaintiffs paid a fixed court-fee of Rs. 19-50 and the value of the suit for purposes of jurisdiction was given as Rs. 16,000. A preliminary objection having been raised by the appellant that the suit was not properly valued for purposes of court-fees and jurisdiction, the Subordinate Judge tried it as a preliminary issue. He held that although the case is covered by section 7 (*iv*) (*c*) of the Court-fees Act, the proviso to that section applied and directed the plaintiffs to pay court-fee on the value of Rs. 16,000 which was the amount at which the plaintiffs valued the suit for the purpose of jurisdiction. The court-fee not having been paid the plaint was rejected. But when the matter was taken up to the High Court, the High Court held that the plaintiffs were not at all bound by the mortgage in dispute or the decree and that therefore there was no consequential relief involved since neither the decree nor the alienation bound the plaintiff in any manner. It was against that decision the matter was taken up to the Supreme Court by the first defendant. The Supreme Court held:—

> "As regards the main question that arises for decision it appears to us that while the court-fee payable on a plaint is certainly to be decided on the basis of the allegations and the prayer in the plaint and the question whether the plaintiff's suit will have to fail for failure to ask for consequential relief is of no concern to the Court at that stage, the Court in deciding the question of court-fee should look into the allegations in the plaint to see what is the substantive relief that is asked for. Mere astuteness in drafting the plaint will not be allowed to stand in the way of the Court looking at the substance of the relief asked for. In this case the relief asked for is on the basis that the property in dispute is a joint Hindu family property and there was no legal necessity to execute the mortgage. It is now well-settled that under Hindu Law if the manager of a joint family is the father and the other members are the sons the father may by incurring a debt so long as it is not for an immoral purpose lay the joint family estate open to be taken in execution proceedings upon a decree for the payment of the debt not only where it is an unsecured debt and a simple money-decree for the debt but also to a mortgage debt which the father is personally liable to pay and to a decree for the recovery of the mortgage debt by the sale of the property even where the mortgage is not for legal necessity or for payment of antecedent debt: (*Faqir Chand* v. *Harnam Kaur*[1]). Consequently when the plaintiffs sued for a declaration that the decree obtained by the appellant against their father was not binding on them they were really asking either for setting aside the decree or for the consequential relief of injunction restraining the decree-holder from executing the decree against the mortgaged property as he was entitled to do".

In this view, the Supreme Court set aside the decision of the High Court and restored the order of the learned Subordinate Judge and directed the plaintiffs to pay the court-fee on the value of Rs. 16,000.

8. *A. Gopalakrishna Iyengar* v. *P. Srirengammal and another*[2], is a decision of this Court concerning section 40 of the Act. In that case, a suit was laid for recovery of possession of properties and for accounting. The properties originally belonged to one Krishna Iyengar. He had a son by name Ananthakrishna Iyengar, who, however, predeceased his father. The first defendant in the suit was the widow of Ananthakrishna Iyengar and the plaintiff in the suit was their only son. It was alleged that there was a partition between the mother and the son in

1. (1967) 2 S.C.J. 811: (1967) 1 S.C.R. 68: A.I.R. 1967 S.C. 727.
2. (1964) 1 M.L.J. 278.

and by which the mother got a life estate in respect of the first schedule properties and the second schedule house was purchased by the first defendant from and out of the income of the properties and the cash assets in her hands. On a check-slip placed before the Court below by the Court-fee Examiner, the learned Subordinate Judge took the view that the matter was governed by section 40 of the Act and called upon the plaintiff to pay additional court-fee in conformity with the said provision. It was the correctness of that direction that was the subject-matter of consideration by this Court in that decision. This Court pointed out:

"It is contended by Mr. Sitarama Ayyar, learned counsel for the petitioner that section 40 would be inapplicable to the present case as the document of partition is void and need not therefore be set aside as a void document is *non est* in law. But section 40 would apply to a case of cancellation of a document which 'purports or operates to create, declare, assign' etc. It cannot be gainsaid that this document of partition purports to create certain rights. The question now is not whether it is void or voidable, but the question is, whether it would fall within the ambit of section 40. Having read the provision of the Act, I am unable to say that this document, whatever its real character may be, void or voidable, would not fall within the ambit of the said provision. The order of the Court below is correct".

9. The above decision was followed by this Court in *R. Muthammal* v. *Narmada and others*[1]. In that case, with regard to the properties of one Rangaswami Naidu there was a partition suit in O.S. No. 134 of 1969 to which the member of the family of Rangaswami Naidu were parties. Rangaswami Naidu had two sons of whom one Venkataswami Naidu, was the second. In the partition suit, not only Venkataswami Naidu, but his son, the ninth defendant in the subsequent suit were made parties. Ultimately the suit was compromised on 9th July, 1969 and a compromise decree was passed in the said suit under the terms of which the A schedule properties in the subsequent suit were given to Venkataswami Naidu and his minor son, and in addition, the B schedule property in the subsequent suit was given to the minor to be enjoyed by him absolutely. In the subsequent suit the plaintiff was the widow of Rangaswami Naidu and she claimed that subsequent to the compromise decree she came to know through her son Venkataswami that he had already been married to one Janaki and as such, Venkataswami's marriage with the tenth defendant Krishnaveni, who was the mother of the minor ninth defendant, was a void marriage. The further case of the plaintiff in the subsequent suit was that the compromise in the earlier suit proceeded on the assumption that the tenth defendant was the legally wedded wife of Venkataswami and the ninth defendants, an offspring of lawful wedlock, and was therefore entitled to a share in the joint family properties which were sought to be partitioned in O.S. No. 134 of 1969. Venkataswami died subsequent to the compromise decree and had left behind him his wife Krishnaveni the tenth defendant in the subsequent suit, whose valid marriage with Venkataswami was impugned and a minor son and a daughter who were respectively the ninth and eleventh defendants in the subsequent suit. According to the plaintiff the ninth and eleventh defendants were only the illegitimate children of Venkataswami and would therefore have no rights whatever in the A and B schedule properties and were bound to re-deliver those properties in their possession to the plaintiff and the other heirs of Rangaswami Naidu. The prayer in the suit was as follows:—

"The plaintiff, therefore, prays that the Court may be pleased to pass a decree:—

(*a*) declaring that the plaintiff is entitled to items 1 and 2 in the B schedule to the plaint and issuing a permanent injunction restraining defendants 9 to 11 from disturbing or interfering with the plaintiff's possession of the same or from collecting the rents for the said items;

(*b*) directing that the A schedule properties be divided into 18 shares by metes and bounds ordering delivery of 10 such shares to the plaintiff;

1. (1975) 2 M.L.J. 304: 88 L.W. 678 : A.I.R. 1976 Mad, 183.

(*c*) directing items 3 to 6 in B schedule be divided into 9 shares and ordering delivery of one such share to the plaintiff;

* * * * *"

The suit was valued under section 25 (*b*) and section 37 (1) of the Act. The Court-fee Examiner issued a check slip raising an objection that, since the plaintiff herself was a party to the compromise decree in the earlier suit, she should get the decree cancelled under section 40 of the Act before further reliefs of declaration and partition in respect of the properties covered by that decree were sought for. The view of the Court-fee Examiner was upheld by the trial Court and it was confirmed by this Court in the decision in question. This Court, after referring to the earlier decision and after extracting section 40 (1) of the Act pointed out:

> "From the wording of the section it may be seen that a drastic change has been made in the matter of payment of court-fee in respect of suits where a cancellation of a decree for money or other property having a money value or other document which purports or operates to create, declare, assign, limit or extinguish any right, title or interest in money, movable or immovable property, is asked for. Undoubtedly, the compromise decree O.S. No. 134 of 1969 is a document, which purports or operates to create, declare and assign the right, title and interests of parties in the properties involved in the said suit. It therefore goes without saying that unless that compromise decree is set aside, the plaintiff will not be entitled to ask for the reliefs of declaration, partition and possession".

10. From the above decisions, it is clear that the plaintiffs in the present case having executed the hundies, they will have to have those hundies cancelled or set aside and for that purpose they will have to pay court-fee under section 40 of the Act. By merely couching the prayer in the form of a declaratory relief, the plaintiffs cannot avoid the reality of the situation, namely, that they are challenging the hundies executed by them on the ground that they were not supported by consideration and they were obtained by misrepresentation or fraud. Under these circumstances, it will be clear that the learned IV Assistant Judge was right in directing the petitioners herein to pay court-fee under section 40 of the Act.

11. However, the learned counsel for the petitioners drew my attention to a judgment of this Court in *R. D. Somasundaram Pillai, a person of unsound mind, by his second son and next friend S. Bhuaneswar* v. *S. Janaki Ammal and others*[1]. In that case, a suit was filed by the plaintiff, a person or unsound mind, by next friend for declaring that a deed of gift executed by him was void and not binding on him. It was held that the court-fee could be paid under Article 17-A (1) of Schedule II of the Court-fees Act, 1870, and that the mere circumstance that the plaintiff asked for a declaration that the deed of gift was void, having been executed by a person who was not of sound mind, did not amount to asking for a relief in the nature of a cancellation of the document, but only asking the Court to give a declaration of the void nature of the document by reason of the contractual incapacity of the party. From one point of view, the above decision rendered with reference to the Court-fees Act, 1870 may not apply to the present case in view of what was pointed out by this Court in *R. Muthammal* v. *Narmada and others*[2], to which I have just made reference wherein it was stated that a drastic change had been made in the matter of payment of court-fee under section 40 of the Act. Apart from that, this decision is clearly distinguishable. In fact, the learned Judge has pointed out in this decision:

> "In so far as a suit on behalf of a person of unsound mind to set aside a transaction to which he was a party is concerned, it is not in any way substantially different from the one seeking to set aside a contract by a minor during his minority and the contract by a person of unsound mind is equally void as that of a minor's contract. Both are in the position of persons not competent to contract and transactions entered into by them are void *ab initio* and there

1. (1955) 1 M.L.J. 310.
2. (1975) 2 M.L.J. 304 : A.I.R. 1976 Mad. 183.

is no need therefore in any suit or proceeding where such persons seek relief to have the cancellation of such a document. They might ignore the existence of such a document as being void and of no effect and proceed to establish their right to other reliefs consequent on the transaction being void".

That is not the case here and therefore that decision will have no application to the present controversy.

12. The result is, the civil revision petition fails and is dismissed. There will be no order as to costs.

13. Time for payment of cour-fees—Two weeks from this date.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, J.*

K.J. Ramamoorthi and another .. *Petitioners**

v.

O.T. Ramamurthy alias Ramakrishnan and another .. *Respondents.*

Tamil Nadu Indebted Agriculturists (Temparary Relief) Act (X of 1975), section 2 (b) and (c)—'Agriculturist' and 'debt'—Definition.

The definition of the term "debt" in section 2 (*c*) of the Tamil NaduAct (X of 1975) consists of two limbs and the latter limb is an inclusive one. It is only with regard to the inclusive portion of the definition, which deals with rent, there is the requirement that the rent shall be in respect of lawful use and occupation of agricultural lands. There is no such requirement in respect of the former limb of the definition according to which the debt is a sum of money which a person is liable to pay under a contract, express or implied, for consideration received.

The present is not a case where the suit was filed by the petitioner-plaintiff for recovery of rent and therefore it is the former limb of section 2(*c*) that applies. If so, there is no requirement that the debt should have been incurred in respect of the lawful use and occupation of agricultural land. The decision in (*E.N. Chacko*, In re, (1954) 67 L.W. 1027) dealt actually with a case of a decree obtained for recovery of a debt. It is only in that context that that decision was to be understood as meaning that the debt must relate to a contract relating to lawful use and occupation of land used for agricultural or horticultural purposes.

[*Para.* 2.]

Case referred to :

E.M. Chacko, In re., (1954) 67 L.W. 1027.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the III Additional Subordinate Judge, dated 26th September, 1975 and made in I.A. No. 339 of 1975 in O.S. No. 81 of 1974.

N.V. Balasubramaniam, for Petitioners.

The Court made the following

ORDER.—This is a petition to revise the order of the learned III Additional Subordinate Judge, Madurai dated 26th September, 1975 staying the trial of O.S. No. 81 of 1974 under Act X of 1975.

In paragraph 5 of the order, the learned Judge says :

"According to the petitioners they are agriculturists entitled to the benefit of Act X of 1975. The petitioners have produced kist receipts to show payment of kist in the name of the second respondents for fasli 1382. In I.A. No. 338 of 1975 the petitioners have produced copies of No.2 account and No.10 (*i*) account to show that the petitioners own lands and they are agriculturists. The respondents have not proved that the petitioners are paying income-tax or agricultural income-tax or sales-tax. As the petitioners own agricultural lands they are agriculturists and so they are entitled to the benefit of Act X of 1975." Learned counsel for the petitioners challenges this conclusion of the learned Subordinate Judge and contends that the provisions of Act X of 1975 will apply only to debts incurred for agricultural purposes, and that is how it was decided by this Court in *E.M. Chacko*, In re[1] while considering the Madras

*C.R.P. No. 2502 of 1976.

19th January, 1979.

1. (1954) 67 L.W. 1027.

Indebted Agriculturists' Temporary Relief Act V of 1954, where also the definitions were the same. I am unable to accept this argument. In Act X of 1975, the expression "agriculturist" has been defined in section 2 (*b*) as meaning "a person who owns an interest in agricultural land, and who, by reason of interest, is in possession of such land or is in receipt of the rents or profits thereof and shall include a lessee; but shall not include.................... The expression debt" has been defined in section 2 (*o*) of the Act as follows :"..................
"'debt' means any sum of money which a person is liable to pay under a contract (express or implied) for consideration received and includes rent in cash or kind which a person is liable to pay or deliver in respect of the lawful use and occupation of agricultural land":

2. Thus, it is clear that the definition of the term "debt" consists of two limbs and the latter limb is an inclusive one. It is only with regard to the inclusive portion of the definition, which deals with rent, there is the requirement that the rent should be in respect of lawful use and occupation of agricultural land. There is no such requirement in respect of the former limb of the definition according to which the debt is a sum of money which a person is liable to pay under a contract, express or implied, for consideration received. The present is not a case where the suit was filed by the petitioner-plaintiff for recovery of rent and therefore it is the former limb of section 2 (*c*) that applies. If so, there is no requirement that the debt should have been incurred in respect of the lawful use and occupation of agricultural land. The decision of this Court relied on by the learned counsel dealt actually with a case of decree obtained for recovery of a debt. It is only in that context the decision of this Court has to be understood as meaning that the debt must relate to a contract relating to lawful use and occupation of land used for agricultural or horticultural purposes. In view of this, no ground has been made out for interference with the order of the learned Subordinate Judge.

3. The civil revision petition, therefore, fails and is dismissed. No costs.

R. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

R. J. Mehta & Co., represented by its Partners .. *Petitioners**

v.

Prootam Singh .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 10 (3) (c)—*Two partnerships* "A" *and* "B"—*Three partners in* 'A' *partnership and four in* "B" *consisting of those very three persons and their father*—'A' *partnership owning building doing business and in occupation of shop No.* 12 *in the premises*—'B' *partnership doing different business in the ground floor of the same shop*—'B' *partnership advancing large sum of money to* 'A' *partnership for purchase of property—Shop No.* 13 *in the same premises let to and in possession of tenant—Petition for eviction by* 'A' *partnership against tenant in shop No.* 13 *to meet requirement of additional accommodation for the business of the* B *partnership—Earlier petition against tenant as having ceased to occupy—Petition dismissed—Observations that if so advised petitioner may file separate petition forthe requirement of* B *partnership—Effect—If* res judicata *'A' partnership if different from* B *partnership in the eye of law—Present suit for eviction by* 'A' *partnership whether maintainable.*

Held: Though the *'A'* partnership consisted of three partners and the 'B' partnership of four partners of whom three were those of the *A* partnership an identity of interest as between the *A* partnership and the *B* partnership cannot be culled out, even though the fourth additional partner was the father of the other three persons who constituted the partnership. Such an independent existence of the two partnerships has to be recognised and implemented and therefore any policy decision by *'A'* partnership can only be with reference to its own firm and cannot have an impact on the other firm and *vice versa*. If such an identity of interest and legal existence has to be

*C.R.P. No. 5901 of 1977. *29th November*, 1978.

maintained, then the '*A*' partnership which was a separate and distinct entity, cannot seek for possession of the property under section 10 (3) (*c*) of the Act (XVIII of 1960) for the benefit of '*B*' partnership, which had an independent existence of its own, governed by a contract of its own and worked on the terms and conditions agreed upon by the partners of the *B* partnership. Section 10 (3) (*c*) is intended to apply to a person, who seeks additional accommodation for his own purposes. Even if the word 'person' appearing in section 10 (3) (*c*) of the Act can be equated to an artificial or legal person like a partnership, the additional accommodation asked for by that partnership should be for its own purpose and for its benefit and not for a different entity which is distinct in the eye of law and which has functions separate from those of the firm asking for such additional accommodation. [*Para.* 6.]

In the doctrine of *res judicata* no magic is involved. It is essentially a pragmatic principle which has to be applied on the facts and circumstances of each case. A decision in an earlier case is *res judicata* in a later case where such an issue might and ought to have been raised in the earlier proceedings. These two fundamental concepts involved in the doctrine of *res judicata* do not appear in the instant case. A very casual observation which was not the resultant of adjudication on an issue which arose directly and substantially in the proceedings and made presumably at the request of counsel and that too casually, without an appraisal on the various facts which are relevant for consideration of an application under section 10 (3) (*c*) cannot operate as *res judicata*. [*Para.* 3.

A partnership is a relationship, though springing from a contract, and the result of an agreement between persons, who are competent to contract and consent *inter se* to become partners. The Legislature has defined partnership as a relation between persons to share the profits of a business carried on by all or any of them, acting for all. Thus, in order to constitute a valid partnership under the Indian Partnership Act, essentially there should be an agreement between the persons who so associate themselves and that agreement should be to share the profits or losses of that business and that business must be carried on by all are any of the other persons concerned, acting for all. Such an essential community of interest in the capital employed, in the general administration of the concern and in the sharing of profits is the basis of a partnership relation. [*Para.* 5]

Held that the application under section 10 (3) (*c*) of the Act made by the petitioner '*A*' partnership that the demised premises were required for the '*B*' partnership which is independent in itself is not sustainable in law. [*Para.* 7.]

Case referred to :

Dulichand v. *Commissioner of Income-tax*, 1956 S.C.J. 317 : (1956) M.L.J. (S.C.) 164 : 1956 S.C.R. 154 : A.I.R. 1956 S.C. 354.

Petition under section 25 of Act XVIII of 1960 as amended by Act XXIII of 1975 praying the High Court to revise the order of the Court of Small Causes, Madras (Appellate Authority) dated 20th November, 1976 and made in H.R.A. No. 221 of 1976 (H.R.C. No. 3349 of 1973 on the file of the Court of Small Causes, Madras)

K. P. Unnikrishnan, for Petitioners.

S.M. Amjad Nainar, for Respondent.

The Court made the following

ORDER.—The unsuccessful landlord before the Appellate Authority in proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, is the petitioner. The petitioner is a partnership company in which there are three partners, Mawaharlal Mehta, Rasiklal Mehta, and Bhismachandra Mehta. It is admitted that this partnership, owns premises No. 79/A and B, Sambudoss Street, Madras and they are in occupation of shop No. 12 in the said premises. The petitioner has also another business in the same shop No. 12 in the ground-floor the name and style of which is Bombay Hardware Syndicate. In this partnership the father of the three partners already referred to is also a partner. The claim of the petitioner partnership, which we would call the *A* partnership, sought for possession of shop No. 13, which is adjacent to shop No. 12 in the occupation of the tenant-respondent on the ground that the partnership business of the Bombay Hardware Syndicate (hereinafter referred to as the *B* partnership) was expanding and that therefore additional space was required by the *B* partnership. The *A* partnership therefore filed the present application under section 10 (3) (c) of the Tamil Nadu Buildings (Lease and Rent Control)

Act, 1960 (hereinafter referred to as the Act), for eviction of the respondent-tenant on the ground of requirement of additional accommodation for the business of the *B* partnership. This was resisted by the respondent on more than one ground. Firstly he would say that the petition is not maintainable under section 10 (3)(*c*) of the Act, as the *A* partnership is different from the *B* partnership in the eye of law, since they are two independent entities. The other ground was that, even if the application was maintainable, the hardship which might be caused to the respondent-tenant would outweigh the advantage which the *A* partnership might gain as a result of the eviction.

2. The Rent Controller found that the *A* partnership was entitled to an order of eviction and that the eviction of the tenant was for the purpose of accommodating the *B* partnership. On appeal the Appellate Authority held that the *A* partnership was different from the *B* partnership and that, as the additional accommodation was required only for the business of the *B* partnership and not for the *A* partnership, which was the owner of the premises, the petition was not maintainable under section 10 (3) (*c*) of the Act. One other contention was raised before the Appellate Authority, namely, that in an earlier proceeding, the *A* partnership was permitted by this Court in *R.J. Mehta & Co., represented by its partners* v. *Narayana Singh Protham Singh*[1], to take proceedings on the fact that the premises was required for the *B* partnership and that therefore that decision would operate as *res judicata.* This was also negatived by the Appellate Authority on the ground that the casual observation made in *R.J. Mehta & Co., represented by its partners* v. *Narayana Singh Protham Singh*[1], would not amount to a decision in favour of the *A* partnership. In the result, the Appellate Authority allowed the appeal of the respondent and set aside the order of the Rent Controller directing eviction.

3. The same contentions are repeated before this Court. We shall now take up the question whether by reason of certain observations made earlier by Varadarajan, J., in *R.J. Mehta & Co. represented by its partners* v. *Narayana Singh-Protham Singh*[1], the plea of the tenant is not available to him and whether the *A* partnership could maintain its petition under section 10 (3) (*c*) of the Act. The *A* partnership filed an earlier petition in the year 1966, H.R.C. No. 3280 of 1966 against the same tenant on the ground that the tenant has ceased to occupy shop No. 13 and that the said shop was required as additional accommodation by the *A* partnership. Both the Rent Controller and the Appellate Authority did not agree with the case of the *A* partnership. In the course of the proceedings the *A* partnership sought for amendment of the petition and claimed that the additional accommodation was required for the purpose of the sister concern, namely the *B* partnership. The original authorities dismissed the application for amendment and a revision petition to this Court was also dismissed. When a civil revision petition was filed against the final order of rejection by both the Rent Controller and the Appellate Authority, Varadarajan, J., did not find any error in the appreciation of evidence by the Tribunals below nor any point of law in the case. While dismissing the petition, however, Varadarajan, J., made the following observation :—

> "If so advised the petitioners may file a separate petition for the requirement of Bombay Hardware Syndicate."

Based on this observation it is contended that the *A* partnership has gained an advantage in law and that the present objection as to the maintainability is barred under the principles of *res judicata*, under section 19 of the Act. It is very well known that in the doctrine of *res judicata* no magic is involved, but it is essentially a pragmatic principle which has to be applied on the facts and circumstances of each case. A decision in an earlier case is *res judicata* in a later case concerning and relating to the same subject-matter, if as between the same parties the issue in question was heard and finally decided as between them. It may also operate as *res judicata* in a case where such an issue might and ought to have been raised in the earlier proceeding. Those two fundamental concepts involved in the doctrine of *res judicata* do not appear in the instant case. This is so because Varadarajan, J., casually observed, though it does not appear to have been necessary for the adjudication of the case, that if the *A* partnership was so advised, they could file an application under section 10 (3) (*c*) of the Act for evicting the tenant on the ground that shop No. 12

1. C.R.P. No. 1109 of 1979.

was required for the *B* partnership. This was a very casual observation which was not the resultant of adjudication on an issue which arose directly and substantially in the proceedings. It therefore follows that such an observation made presumably at the request of counsel and that too casually, without an appraisal on the various facts which are relevant for consideration of an application under section 10 (3) (*c*), cannot operate as *res judicata*. The Appellate Authority was right in having rejected this objection raised by the *A* partnership.

4. The other contention of the tenant is that the application is not maintainable under section 10 (3) (*c*) of the Act. There is considerable force in this contention. When the petition came up earlier before this Court, an opportunity was given to the *A* partnership to produce the relevant accounts and the assessment orders made by the Income-tax Department to show that there is a collusion of interest as between the *A* partnership and the *B* partnership in the sense that the profit and loss of one firm were taken as the profit or loss of the other firm. The landlord has produced three statements of accounts. On the basis of such accounts produced (copies of which were served on the other side) the contention is that, though physically and legally the *A* partnership and the *B* partnership are not the same yet practically they are one. In order to sustain this contention, it is stated that the *B* partnership has advanced a sum of Rs. 2,63,286 without interest to the *A* partnership for the purchase of this property and that therefore there is such an identity of interest between the two partnerships.

5. A partnership is a relationship, though springing from a contract, and the result of an agreement between persons, who are competent to contract and consent *inter se* to become partners. Our Legislature has defined partnership as a relation between persons to share the profits of a business carried on by all or any of them, acting for all. Thus, in order to constitute a valid partnership under the Indian Partnership Act, essentially there should be an agreement between the persons who so associate themselves and that agreement should be to share the profits or losses of that business and that business must be carried on by all or any of the other persons concerned, acting for all. Such an essential community of interest in the capital employed in, the general administration of the concern and in the sharing of profits is the basis of the partnership relation. The Supreme Court in *Dulichand* v. *Commissioner of Income-tax*[1], observed :—

> "In our opinion, the word 'persons' in section 4 of the Indian Partnership Act, which has replaced section 239 of the Indian Contract Act, contemplates only natural or artificial, *i.e.*, legal persons, and, for the reasons stated above, a firm is not a 'person' and as such is not entitled to enter into a partnership with another firm or Hindu undivided family or individual."

This does not mean that, if a firm enters into a partnership with another firm, the compendious partnership is unlawful on that ground. It can only be explained thus, that all the persons in the joining firm will become partners in the amalgamated firm in their individual capacity.

6. This being the legal position, though the *A* partnership consists of three partners and the *B* partnership consists of four partners of whom three are those of the *A* partnership, an identity of interest as between the *A* partnership and the *B* partnership cannot be culled out, even though the fourth additional partner in the partnership is the father of the other three persons who constitute the *A* partnership. Such an independent existence of the two partnerships has to be recognised and implemented and therefore any policy decision by the *A* partnership can only be with reference to its own firm and cannot have an impact on the other firm and *vice versa*. If such an identify of interest and legal existence has to be maintained, then the *A* partnership, which is a separate and distinct entity, cannot seek for possession of the property under section 10 (3) (*c*) of the Act for the benefit of the *B* partnership which has an existence of its own, governed by a contract of its own and worked on the terms and conditions agreed upon by the partners of the *B* partnership. Section 10 (3) (*c*) is intended to apply to a person, who seeks additional accommodation *for his own purposes*. Even if the word 'person' appearing in section 10 (3) (*c*) of the Act can be equated to an artificial or legal person like a partnership, the additional accommodation asked for by

1. 1956 S.C.J. 317: 1956 S.C.R. 154: (1956) 1 M.L.J. (S.C.) 164: A.I.R. 1956 S.C. 354.

that partnership should be for its own purpose and for its benefit and not for a different entity which is distinct in the eye of law and which has functions separate from those of the firm asking for such additional accommodation.

7. Factually also in the instant case the income-tax returns filed before this Court do not show such an identity of interest or exchange of profits and losses of one firm with the other. The mere fact that the *B* partnership has advanced a large sum to the *A* partnership for the purchase of the property would only make the *B* partnership a creditor of the *A* partnership. The additional factor that interest is not charged by the *B* partnership would not submerge it in the legal entity of the *A* partnership. No doubt, in C.R.P.No. 1100 of 1973, an observation, presumably at the request of counsel, was made by this Court to the effect that the *A* partnership might take proceedings for the eviction of the respondent on the foot that the demised premises were required for the *B* partnership. It cannot be understood that Varadarajan, J., examined the position from all the aspects and adjudicated upon the real issue under consideration, when he said :

"If so advised, the petitioners may file a separate petition for the requirement of Bombay Hardware Syndicate."

In fact this, Court did not say that an application for the above purpose could be made by the *A* partnership under section 10 (3) (*c*) of the Act. Having regard to the distinct nature of the two firms, which existed by themselves and on their own, the order of the Appellate Authority has to be sustained. The application under section 10 (3) (*c*) of the Act made by the petitioner *A* partnership, that the demised premises were required for the B partnership, which is independent in itself, is not sustainable in law.

7. The Civil Revision Petition therefore fails and is accordingly dismissed. There will be no order as to costs.

R.S. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*Mohan, J.*

Ranganatha Pillai and 11 others .. *Appellants**

v.

The Commissioner for Hindu Religious and Charitable Endowments, Administration Department, Madras-34. .. *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 6, *clause* (*ii*)—"*Hereditary trustee*"—*Meaning.*

Held : that the definition of 'hereditary trustee' in section 6, clause (*ii*) of the Tamil Nadu Hindu Religious and Charitable Endowments Act is very wide in its amplitude. Hereditary trustee is not to be understood as from father to son or son to his son. Having regard to the comprehensive definition, it is enough if a usage is established for a long number of years evidencing exercise of hereditary trusteeship of a particular temple or temples by members of a family. In the instant case, there was no gainsaying that the plaintiff's family alone exercised such right. There were very valuable documents in which description was found that the predecessors of the plaintiff's were the trustees. No objection was taken to the geneological tree and the trusteeship had been continuously exercised by the members of the plaintiff's family without any objection or hindrance. Non-description of the trusteeship as "*parambarai*" or "*adheenam*" is immaterial. Hence it must certainly be held to be hereditary. [*Para.* 9]

Cases referred to :—

V. Ramados v. K. Hanumantha Rao, (1913) I.L.R. 36 Mad. 364 : 21 M.L.J. 952 ; *Babu Gurukkal* v. *The Commissioner for Hindu Religious and Charitable Endowments Board,* (1964) 1 M.L.J. 384 ; *The Assistant Commissioner, Hindu Religious and Charitable Endowments (Administration) Department* v. *D. Rajagopala Poondar,* 84 L.W. 764 : A.I.R. 1972 Mad. 105; *Venkatarama* v. *L.A. Dhangappa,* (1972) 1 M.L.J. 325 : 84 L.W. 695 : A.I.R. 1972 Mad. 119.

*Appeal No. 250 of 1975. *8th January,* 1979

Appeal against the decree of the Court of the Principal Subordinate Judge, Chingleput dated 30th November, 1974 and passed in Original Suit No. 111 of 1973.

M. Srinivasan, for Appellants.

Miss N. Vimala, for Respondents.

The Court delivered the following

JUDGMENT.—The appeal is directed against Original Suit No. 111 of 1973 on the file of the Subordinate Judge of Chingleput, which is a suit to set aside the order of the Commissioner for Hindu Religious and Charitable Endowments, Madras dated 16th December, 1972 passed in A.P. No. 130 of 1972 and for a declaration that the plaintiffs are the hereditary trustees of the suit temple. The following geneological tree would be useful to appreciate the claims of the plaintiff. Roya Raddiar had two sons, Narayanan and Krishnan. Narayanan's son is Munuswami Reddiar, the second plaintiff. Krishnan's sons Doraiswami Reddiar is 3rd plaintiff and Murthy Reddiar is the 4th plaintiff.

2. There was another Vengu Pillai, who had four sons, Anguswamy, Kannaiah, Chinnaswami and Dorai Pillai the 9th plaintiff. Chinnaswami's sons are Ramachandra Pillai, Venkataramanujam Pillai and Chandrasekaran Pillai, Plaintiffs 6 to 8 respectively. Doraiswami Pillai is the 5th plaintiff. There two families claimed among themselves the hereditary trusteeship of the two temples Sri. Mariamman and Sri Pidari Ponniamman, of Padi Village, Saidapet Taluk. The plaintiffs filed an application under section 63 (*b*) of the Tamil Nadu Hindu Religious and Charitable Endowments Act (hereinafter referred to as the Act) pressing their claim to the office of the hereditary trusteeship and that was dismissed. Thereupon an appeal was preferred to the Commissioner under section 69 (1) of the Act. The Commissioner, by his order dated 16th December, 1972, dismissed the appeal. Thus, the necessity for the suit.

3. The Commissioner, Hindu Religious and Charitable Endowments Department, in his written statement contended that no portion of the plaint allegation is admitted and he puts the plaintiffs to strict proof of their case that they are hereditary trustees of the suit temples. It was also claimed that they were never in possession and enjoyment of the suit temple. They being *periathanakarars*, they are the trustees of the temple but that would not mean that they are hereditary trustees.

The following issues were framed :

1. Whether the plaintiffs are the hereditary trustees of the suit temples?

2. Whether the order of the Commissioner Hindu Religious and Charitable Endowments concerned, is liable to be set aside?

3. To what relief are the plaintiffs entitled?

4. On issue No. 1, the learned Subordinate Judge, Chingleput, came to the conclusion that the plaintiffs happened to be trustees and were exercising rights as such, because, they happened to be *periathanakarars* of the village, but that does not mean that their office could be characterised as hereditary within the meaning of section 6, clause (*ii*) of the Act. On issue No. 2, the learned Subordinate Judge held that the order of the Commissioner is not liable to be set aside, with the result, he dismissed the suit. Plaintiffs have come up to this Court by way of this appeal.

5. Mr. M. Srinivasan, learned counsel for the appellants urges that in this case, there is no gainsaying that the two families of the plaintiffs alone have been exercising the rights as trustees right from 1865 and no other person had at any point of time caused any hindrance to the right nor that that was ever questioned. Having regard to the long usage of exercising the trusteeship it must be held that the plaintiffs have established their right as hereditary trustees. The finding of the learned Subordinate Judge that merely because none of the documents filed described the predecessors of the plaintiff as *periathanakarar* or *adheenakarthar*, their rights could not be characterised as hereditary trustees, is not correct. In support of his submission, the learned counsel cited an unreported decision in O.S.A. No. 79 of 1951, of a Division Bench of this Court (1954) M.W.N. 141 (S.N.), wherein it was held that when the evidence showed that for a period of at least 70 years, there had been three trustees in the temple, one trustee from each of three families, this was

sufficient to establish the hereditary right. Likewise in *V. Ramados and two others* v. *K. Hanumantha Rao*[1]; *Babu Gurukkal* v. *The Commissioner for Hindu Religious and Charitable Endowments Board, Madras*[2]; *The Assistant Commissioner, Hindu Religious and Charitable Endowments (Administration) Department, Thanjavur* v. *D. Rajagopala Poondar and others*[3]; and *Venkataraman* v. *L. A. Thangappa*[4], where for three generations the trusteeship remained in a family, it must be considered to be hereditary in that family.

6. Miss. N. Vimala, appearing for the Commissioner, Hindu Religious and Charitable Endowments, says that the first and foremost point to be considered is that if the trustees were really hereditary trustees of the temple, as rightly stated by the learned Subordinate Judge, in none of the documents, they were referred to as hereditary trustees. The failure to describe them as Adhinam or hereditary trustees, itself will show the hollowness of their claim.

7. Even otherwise, the earliest document is of the year 1865, *i.e.*, Exhibit A-1. The next document Exhibit A-14 is of the year 1889. There is absolutely no link between the two. Therefore even from that point of view, the claim of the plaintiff cannot succeed. The cases cited do merely lay down the general proposition. But, here there is no evidence to show that the plaintiffs were exercising their rights as hereditary trustees.

8. The only point to be considered is whether the plaintiffs can be called hereditary trustees within the meaning of section 6, clause 11 of the Act.

9. The definition of hereditary trustees as contained in section 6, clause 11 is as follows :—

> "Hereditary trustee means, the trustee of a religious institution, succession to whose office devolves by hereditary right or is regulated by usage or is specifically provided for by the founder, so long as such scheme of succession is in force."

Having regard to the comprehensive definition, it is enough if the usage is established for long number of years evidencing exercise of hereditary trusteeship of a particular temple or temples by members of a family. In the instant case, there is no gainsaying that it is the plaintiffs' family (Roya Reddiar's family and Vengu Pillai's family) alone exercise such right. There are very valuable documents like Exhibit A-1 and A. 14 etc. in which description is found that the predecessors of the plaintiffs are the trustees. It also requires to be noticed that no objection is taken to the geneological tree as cited above and the trusteeship has been continuously exercised by the members of the plaintiffs' family without any objection or hindrance. Hence, it must certainly be held to be hereditary. The learned Subordinate Judge, Chengleput, in my opinion, erred in holding that because of the nondescription as "*Parambarai*" or "*Adheenam*" their claim cannot be confined within the four corners of section 6, clause 11. As I said above, hereditary trusteeship is not to be understood as from father to son and from son to his son. That is because the definition is very wide in its amplitude. The various documents which have been filed on the side of the plaintiff are all *ante litem motem* and from that point of view they are all of high evidentiary value. The argument of the learned counsel for the respondent that there is no link between Exhibit A-1 and Exhibit A-14 and that it is for the plaintiffs to produce series of documents for every year to prove their case cannot be accepted. So long as these documents evidence transactions long before the suit, there can be no legal or valid objection for placing reliance upon the same. The judgments cited on the side of the plaintiffs do support the contention that when a member of a particular family alone was exercising rights of trusteeship, it will fall under the category of hereditary trustee. Vide, the unreported decision in O. S.A. No. 79 of 1951 by a Division Bench of this Court (1951 M.W.N. (S.N.) pages exp. P. IX) and in all the three decisions in *Babu Gurukkal* v. *Commissioner for Hindu Religious and Charitable Endowments Board*[1]; *Assistant Commissioner Hindu Religious and Charitable Endowments Department* v. *D. Rajagopalat*[2]; and *Venkataraman* v. *L.A. Thangappa*[3] this Court has taken the view, that when in respect of a temple for the past three generations the members of the family of a person had

1. 21 M.L.J. 952: (1913) I.L.R. 36 Mad. 364.
2. (1964) 1 M.L.J. 384.
3. 84 L.W. 764: A.I.R. 1972 Mad. 105.
4. (1972) 1 M.L.J. 325: 84 L.W. 695: A.I.R. 1972 Mad. 119.

1. (1964) 1 M.L.J. 384.
2. 84 L.W. 764: A.I.R. 1972 Mad. 105.
3. (1972) 1 M.L.J. 325: A.I.R. 1972 Mad. 119.

managed the affairs of the temple, it must be held that the trusteeship was hereditary in the family of that person. The above ratio clearly applies to this case.

10. In the result, the judgment and decree of the Subordinate Judge, Chengleput are hereby set aside and the appeal is allowed. The suit is decreed as prayed for. However, there will be no order as to costs.

R.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Mohan, J.*

Lakshmi Ammal .. *Appellant**

v.

The Special Tahsildar (L A.) Miscellaneous Scheme, Saidapet and 19 others .. *Respondents.*

Will—Construction—Use of the words "சர்வ சுதந்திரம்" and "ஆண்டு அனுபவித்துக் கொள்ள வேண்டியது"—Nature of estate conferred—Absolute or life estate.

Held, that inthe absence of words like "பாத்தியம்" or "பாத்தியதை" after the words சர்வ சுதந்திரம் in a will, the latter expression alone may not connote an absolute estate.

The words "ஆண்டு அனுபவித்துக் கொள்ள வேண்டியது" would connote only a right of enjoyment. That is made clear by the recital in a later clause of the will 'மேல்படி இலக்ஷ்சுமி அம்மாளுக்கு சந்ததிகள் வுண்டாகிர வரையிலும் மேல்படி பாவத்துமான சொத்துக்களை இருவரும் தானாதி விக்ரயங்கள் செய்யக்கூடாது." There is a clear restraint against alienation. [*Para.* 6.]

It is axiomatic that in construing a will, it must be read as a whole and every clause must be given effect to. What has been taken by "L" under the will in the present case was only a life estate and not an absolute estate. [*Para.* 8.]

Case referred to :—

Ratnasami Pillai v. *Kathija Bivi Ammal*, (1950) 2 M.L.J. 496.

Appeal against the decree of the Court of the Additional Subordinate Judge, Chengleput.

* Appeal No. 481 of 1974. *19th December,* 1978.

dated 25th July, 1972, in C. R.O. P. No. 39 of 1970.

V.C. Veeraraghavan and *M.D. Lakshminarasimhan,* for Appellant.

The Additional Government Pleader and *D.K. Srinivasagopalan,* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a reference made under sections, 30 and 31 (2) of the Land Acquisition Act.

2. An extent of 3 acres 68 cents in S. No. 18/5 of Eranavur village in Saidapet Taluk, was acquired for the purpose of establishing a thermal station in Eraravur village. A compensation totalling Rs. 67,185-30 was deposited into Court. Since there were disputes concerning this amount, a reference was made under sections 30 and 31 (2) of the Land Acquisition Act. The question arose this way. The claimant (Lakshmi Ammal), who is the appellant herein, put forth a claim on the basis that the property belonged to her absolutely under a registered will and testament of Ponnambala Mudaliar, her paternal grandfather. The will is dated 18th October, 1918. The said Ponnambala Mudaliar died in 1919. The will was duly probated in the High Court of Madras. Under the terms of the will, he created a life interest in respect of his properties in favour of his second wife Sundarammal without any powers of alienation such as sale, mortgage etc. Sundarammal died on 5th May, 1936. After the lifetime of Sundarammal, Lakshmi Ammal and her husband late Jayarama Mudaliar got the properties absolutely. It is provided in the will that in the event of Jayarama Mudaliar marrying another wife without the consent or permission of Lakshmi Ammal, Jayarama shall lose all the rights in the properties enjoyed by Lakshmi Ammal. Contrary to the above direction, Jayarama married a second wife against the wishes of his first wife and thereby Jayarama forfeited all his rights. As a matter of fact, the High Court of Madras in its decision in C.S. No. 228 of 1938 held that Jayarama had forfeited his rights to the property covered by the will in view of the forfeiture clause above mentioned. This decision was affirmed in A.S.No. 27 of 1939. Jayarama died in 1949 leaving Lakshmi Ammal as the sole heir. His second wife

had predeceased him. No children were born to Lakshmi Ammal and Jayarama. As such, she became absolutely entitled to the amount lying in Court deposit representing the compensation. As a matter of fact, her right had been recognised in the prior proceedings in the Court of reference (Sub-Court) (Chingleput) in C.R.O.P. No. 641 of 1968, on 17th February, 1969.

3. The other relations of Ponnambala Mudaliar, who were the legatees under the will, in short contended that what Lakshmi Ammal took under the will dated 18th October, 1918, of Ponnambla Mudaliar was a life estate and not an absolute estate. On this, two points were posed for determination :—

1. Whether the first claimant is entitled to draw the entire compensation amount as the absolute owner of the reference land as per the terms of the will executed by the deceased Ponnambala Mudaliar on 18th October, 1918 ?

2. Whether the first claimant has been given only a life-estate under the terms of the will above referred and she is entitled to draw only the interest for the amount concerned in this reference and the compensation has to be drawn by claimants 2, 4, to 6 and 7 to 21 ; the claimants 2, 4 to 6 and 19 to 21 being entitled to 1/4th share ; claimants 7 to 12 being entitled to half share and claimants 13 to 18 being entitled to the balance of 1/4th share? On a detailed consideration of the recitals of the will marked as Exhibit A-1 of Ponnambala Mudaliar, dated 18th October, 1918, the Court of reference held that what was taken by Lakshmi Ammal was only a limited interest. Accordingly, it answered the reference. Hence the present appeal by Lakshmi Ammal, who figured as the first claimant in the Court of reference.

Mr. V.C. Veeraraghavan, learned counsel appearing for the appellant, after taking me through the recitals in the Will, Exhibit A-1, urges the following :— (1) having regard to the use of the words "*சர்வ சுதந்திரத்தோடு புத்திர பௌத்திர பாரம்பரியமாய்*" it would mean that what was taken by Lakshmi Ammal was an absolute estate. Wherever the testator wanted to give only a life estate, he had clearly mentioned so. In the absence of any restrictive words of that kind "*சர்வ சுதந்திரம்*" would take in an absolute estate and not a restricted estate. In support of this submission, he relies on a decision of this Court reported in *Ratnasami Pillai* v. *Kathija Bivi Ammal*,[1]. The contingency contemplated in the will, namely, children being born to Lakshmi Ammal, had not arisen. If the object was to preserve the estate to the children of Lakshmi Ammal, and in the absence of any issue if it is construed to be a limited estate, it would result in a defeasance or intestacy. Law abhors intestacy. Nor again, can there be a defeasance clause. As to how defeasance brought about is dealt with by Mr. Mantha Ramamurti on the Law of Wills, page 442, paragraph 31 on which the learned counsel would place reliance. On the same line of argument, he would also draw support from Halsbury's Laws of England, Third Edition, Volume 39 at page 929, praragraph 1405 and submits that a condition to operate as a defeasance of a vested estate must be shown to have happened strictly and to the letter of it. That is not the position here.

4. The learned Subordinate Judge, had gone wrong in trying to construe the nature of the estate derived by Lakshmi Ammal with reference to the later clause found in the will in the event of the death of Lakshmi Ammal. The word "மத்தியில்" must be given a definite meaning and according to the learned counsel, it must connote not her taking a life estate, but an absolute estate. If the property had already vested in Lakshmi Ammal, that vesting cannot be cut down or that absolute estate cannot be whittled down by the later clause. Then again, according to the learned counsel, what is important to be noted is, in the event of Lakshmi Ammal dying in the middle, her husband Jayarama would be deprived of his life enjoyment of the portion of the estate. Lastly it is urged that this very will came up for interpretation earlier before this Court and it has been construed as if Lakshmi Ammal took an absolute estate. That judgment, though not directly on point, would support the stand of the appellant.

5. Mr. Srinivasagopalan, learned counsel for the respondents would urge, after taking me through the entirety of the will, that the object of the testator was to benefit each and everyone

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1. (1950) 2 M.L.J. 496.

of his relations. That the testator was a wordly-wise man is evident from the language employed in the will. By a reading of the entirety of the will, which is a cardinal principle in construing the will it appears that he did not want any of his female relations to take an absolute estate. On the contrary, he restricted the enjoyment during the lifetime of these female-holders. Even in the case of the second wife Sundarammal, he had so provided. While dealing with the rights of Lakshmi Ammal, all that is said is "*சர்வ சுதந்திரம்*". Nowhere, right is created. The said "*சர்வ சுதந்திரம்*" is followed by "*ஆண்டு அனுபவித்துக் கொள்ள வேண்டியது*". The later words "*ஆண்டு அனுபவித்துக் கொள்ளவேண்டியது*" cannot connote anything more than a mere enjoyment. If the object was to preserve the estate for the issues of Lakshmi Ammal in the absence of the issue there is no defeasance clause. As a matter of fact, the testator had provided a model devolution in both the contingencies, in the event of Lakshmi Ammal predeceasing Jayarama without issues. This is clear by the use of the word "*மத்தியில்*". That word means only that. In such a contingency the property was to devolve on Lakshmi Ammal's father Ganapathi Mudaliar on the one hand and Subramania Mudaliar and Balasundara Mudaliar on the other, in equal moieties. Therefore, no intestacy whatever arises. If the construction as sought to be made out by the appellant is accepted, all the later clauses would be rendered *otiose* or ineffective. That certainly is not the correct way of interpreting a solemn document like a will, since it is well-settled law that each and every clause must be given effect to. The decision cited, namely, *Ratnasami Pillai* v. *Kathija Bivi Ammal*[1]. merely dealt with "*சர்வ சுதந்திரம்*" But that phrase alone cannot be pressed too much into service because they are qualified by later words "*ஆண்டு அனுபவித்துக்கொள்ளவேண்டியது*". The passages in the text relating to law of Wills in Halsbury cannot support the interpretation sought to be placed by the learned counsel for the appellant.

6. Having regard to the above controversy, the only point that arises for my determination is, what is the nature of the estate taken by Lakshmi Ammal. In order to answer this question necessarily a detailed reference has to be made to the various clauses occurring in the will. The will is marked as Exhibit A-1, dated 18th October, 1918 executed by Ponnambala Mudaliar. He says in the beginning

> "*எனக்கு பிற்காலம் என் குடும்பத்தார் அனுபவிக்க வேண்டிய விபரம் 1வது என் இளைய பாரியாள் செளபாக்கியவதி சுந்திரம்மாள் எனக்கு பிற்காலம் அனுபவிக்க வேண்டிய சொத்துக்கள்*".

After detailing out the property he adds on :

> "*என்னுடைய இளைய பாரியாளாகிய செளபாக்கியவதி சுந்திரம்மாள் அவள் ஜீவலை பரியந்தம் மேல்படி வீடு சவுக்கு தோப்பு நிலம் முதலியதுகளுக்கு வருஷ வாரியில் அடியில் கண்ட என்னுடைய எக்சிகூட்டர்கள் மூலமாய் அசெஸ்மெண்டு குயிட்ரெண்டு செலுத்திக் கொண்டு மேல்படி சொத்துக்களில் வரப் பட்ட வரும்படியை சர்வ வில்லங்க சுத்தியாய் அனுபவிக்க வேண்டியது. என் இளைய பாரியாள் காலமான பிறகு அப்போது இருக்கும் யாவத்துமான சொத்துக்களையும் அதாவது தண்டையார் பேட்டை வீடு தோட்டம் எறணூர் நனுநிலம் சவுக்குமரம் மேல்படி எறணூர் கிராமத்தில் புனுஜாரி தோட்டம், வீடு ரொக்கம் முதலியவைகளை செளபாக்கியவதி இலக்ஷ்சுமி அம்மாளும் அவள் புருஷன் சி. ஜெயராம முதலியாரும் சர்வ சுதந்திரத்தோடு புத்திர பௌத்திர பாரம்பரியமாய் ஆண்டு அனுபவித்துக்கொள்ள வேண்டியது. மேல்படி இலக்ஷ்சுமி அம்மாளுக்கு சந்ததிகள் உண்டாகர வரையிலும் மேல்படி யாவத்துமான சொத்துக்களை இருவரும் தானாதி விக்கிரயங்கள் செய்யக்கூடாது. மேல்படி இலக்ஷ்சுமி அம்மாளுடைய சந்ததிகள் அவர்கள் காலத்தில் மேல்படி சொத்துக்களை சர்வ வில்லங்க சுத்தியாய் வித்தி ஒத்தி தானாதி விக்கிரயங்களுக்குரித்தாய் ஆண்டு அனுபவித்துக் கொள்ள வேண்டியது*".

Stopping here for a moment, if a comparison is made between the nature of the estate conferred upon Sundarammal and Lakshmi Ammal, at the first blush it may appear that what was conferred upon Lakshmi Ammal was not a mere life estate, but an absolute estate. A careful reading of the later clause dealing with the rights of Lakshmi Ammal will disclose the following:—There is no use of the word "*பாத்தியம்*" after the words "*சர்வ சுதந்திரம்*". In such a case alone, a right or interest is created. Then again there is no gainsaying that the words "*ஆண்டு*

1. (1950) 2 M.L.J. 496.

அனுபவித்துக் கொள்ள வேண்டியது" would connote only a right of enjoyment. That is made clear by stating in the later clause:

> "மேல்படி இலக்ஷ்சுமி அம்மாளுக்கு சந்ததிகள் வுண்டாகிற வரையிலும் மேல் படி யாவத்துமான சொத்துக்களை இருவரும் தானுதி விக்கிரயங்கள் செய்யக் கூடாது."

There is a clear restraint against alienation. One way of looking at the matter would be having conferred an absolute estate on Lakshmi Ammal, any later restraint against alienation so as to defeat or whittle down that absolute estate, must be held to be invalid. But such a construction is not possible in this case, because the object of conferring a life estate on Lakshmi Ammal is to preserve the property to the issues of Lakshmi Ammal through Jayarama. As to how this conclusion is inescapable, I will also demonstrate by reference to a later clause in the will. Suffice it at this juncture to state the words "*சர்வ சுதந்திரம்*" alone may not connote an absolute estate because at the risk of repetition I may state there is no word "*பாத்தியம்*" or "*பாத்தியதை*". The decision in *Ratnasami Pillai* v. *Kathija Bivi Ammal*[1], dealt with a clause "*சர்வ சுதந்திரத்துடன் அடைய வேண்டியது*". That decision, in my view, has no application to the facts of the presenst case because there are no qualifying words mentioned in the later clause dealing with the nature of the estate conferred on Lakshmi Ammal.

7. What has to happen in the event of Lakshmi Ammal dying is also provided for under the will, since it proceeds to state:

> "சௌபாக்கியவதி இலக்ஷ்சுமி அம்மாளுடைய புருஷன் சி. ஜெயராம முதலியார் மேல்படி லெக்ஷ்சுமி அம்மாளுடைய அனுமதியில்லாமல் அவளுக்கு விரோதமாய் வேறே விவாகம் செய்துக்கொள்வானுகில் மேல்படி இலக்ஷ்சுமி அம்மாள் அனுபவித்த யாவத்துமான சொத்துக்களுக்கும் அவள் புருஷன் சி. ஜெயராம் முதலியாருக்கும் யாதொரு பாத்தியமும் கிடையாது, தெய்வீகமாய் மேல்படி இலக்ஷ்சுமி அம்மாள் சந்ததியில்லாமல் மத்தியில் (Emphasis Supplied) காலமாய் விடுவளாகில் தண்டையார் பேட்டை வீடு தோட்டம் தவிர மத்த யாவத்துமான நனுநிலம் சவுக்குமரம் முதலிய சொத்துக்களில் மேல்படி இலக்ஷ்சுமி அம்மாளுடைய தகப்பன் வெ. கணபதி முதலியார் ஒரு பாதியும் மத்தொரு பாதி சொத்துக்களை என் சகோதரர்கள் வெ. சுப்பிரமணிய முதலியார், வெ. பாலசுந்திர முதலியார் அல்லது அவர்களுடைய சந்ததிகள் சம பாகமாக பாகித்துக்கொண்டு தானுதி விக்கிரயங்களுக்குரித்தாய் ஆண்டு அனுபவித்துக் கொள்ளவேண்டியது".

It is relevant to note at this stage that the earlier forfeiture clause in the event of Jayarama marrying against the wishes of Lakshmi Ammal alone came up for interpretation in this Court in C. S. No. 228 of 1938 Vide Exhibit A-2. The learned Judge Venkataramana Rao, J., held:

> The dominant intention of the testator was to provide for Lakshmi Ammal, and her husband was jointly associated with her in the bequest, the main object being that they should jointly enjoy the property and thereafter transmit to their children. Whether in law a joint bequest can be taken by them with a right of survivorship or whatever the testator may have intended, Lakshmi Ammal and her husband can in law only take the property as tenants in common, the intention of the testator is clear that it should be enjoyed jointly by them both and the property that was meant to be enjoyed by Lakshmi Ammal was the same as the property intended to be enjoyed by her husband. Therefore, when he used the expression, "properties enjoyed by her" in the forfeiture clause, he clearly meant the properties already bequeathed to both and intended to be enjoyed by them in the previous clause of the will.

This decision was appealed against in O.S. A. No. 27 of 1939 vide Exhibit A-3. A Division Bench consisting of Leach, C.J. and Horwill, J. dismissed the appeal and held:

> "It is clear that the testator did not intend that they should have an absolute estate because the will then proceeds to direct that neither the husband nor the wife shall "gift mortgage or sell all the said properties". This indicates that it was his intention that these properties should go to their issue. In view of the words "shall hold and enjoy absolutely from son to grandson and so on in succession" which are used when conferring an estate on the appellant and the respondent, the prohibition against alienation may not be a lawful one. But there can be no doubt that it was the

1. (1950) 2 M.L.J. 496.

intention of the testator that the property should eventually descend upon their children".

Even these two judgments, in my view, do not support the contention of the learned counsel for the appellant that what was taken by Lakshmi Ammal was an absolute estate.

8. The word "மத்தியில்" would only mean in my view, if Lakshmi Ammal were to predecease Jayarama without any issues and not as is contended by the learned counsel for the appellant. There is a further fallacy in the argument of the appellant's counsel. If the construction as sought to be placed by him is to be accepted, then the other clause namely the devolution on Lakshmi Ammal's father Ganapathi Mudaliar, and Subramania Mudaliar and Balasundara Mudaliar, the brothers of the testator, would be rendered negatory. There is no intestacy here. Therefore,the general principle that law abhors intestacy, cannot arise. After Lakshmi Ammal's enjoyment during her lifetime, a portion of the property is carved out of the entire estate conferred jointly on Lakshmi Ammal and Jayarama and that estate is to be taken in equal moieties by Ganapathi Mudaliar, the father of Lakshmi Ammal on the one hand and Subramania Mudaliar and Balasundara Mudaliar, the brothers of the testator on the other, because it is states' in the above clause

"தண்டையார்பேட்டை வீடு தோட்டம் தவிர மத்தாவத்துமான நஞ்நிலம் சவுக்கு மரம் முதலிய சொத்துக்களில்"

That means the house and garden of Thandayarpet are excluded for the purpose of devolution on the above legatees. From this, it is sought to be argued that this would have the effect of depriving Jayarama of his life enjoyment of the properties other than the house and garden at Thandayarpet. That is so. In fact that is what the testator intended. After the death of Lakshmi Ammal as I observed above, a portion of the estate is carved out for the purpose of devolution and the remaining alone would or could be enjoyed by Jayarama during his lifetime because what was conferred was a joint right of possession during the life of Lakshmi Ammal and Jayarama. By construing in this manner, certainly no part of the will is rendered ineffective. It is axiomatic that in construing the will, it must be read as a whole and every clause must be given effect to. Therefore, these wholesome principles should be borne in mind in construing Exhibit A-1. In fact I may say that the learned Subordinate Judge has approached the entire question in a proper perspective and I am in agreement with him with regard to the interpretation of Exhibit A-1. In fine I hold that what was taken by Lakshmi Ammal under Exhibit A-1 was only a life estate and not an absolute estate as contended by the learned counsel for the appellant. As to how the estate would devolve after the lifetime of Lakshmi Ammal is not a matter which could be gone into within the narrow compass in a reference under sections 30 and 31 (2) of the Land Acquisition Act and the parties, if so advised, would agitate the same separately.

I have already referred to the fact that the total amount of compensation is Rs.67,815-30P. The particulars of the same are as under :—

"*Particulars of Land acquired* :

Survey Number :	18/5.
Extent :	3.60 acres.

Particulars of trees, buildings, wells, etc., tree value 576-00. Particulars of compensation awards under section 11 of the Land Acquisition Act.

@ *Rs.* 130 - *per cent.*		Rs.
Land Value	..	47,840-00
Well value	..	1,700-00
15% Solatium	..	7,517-00
Interest: @ 4 per cent from 9th November, 1964 to 18th March, 1969	..	1-10,18-00
Total.	..	67,815-30

Date of possession of the land 9th November, 1964."

Mr. V.C. Veeraraghavan, learned counsel for the appellant Lakshmi Ammal would be well entitled, even on my finding, to that interest from 9th November, 1964 to 18th March, 1969 amounting to Rs. 10,181-90 P: I think this contention is well-founded. Therefore, straightaway Lakshmi Ammal would be entitled to draw the sum of Rs. 10,181-90 P. and any other interest which had accrued subsequent to that date which can be drawn by her once in six months. The remaining, namely, the value of the land, value of the well, 15% solatium would continue to remain in Court deposit and will be available to the claimants only after the death of Lakshmi Ammal and that portion of the judgment of the Court below in paragraph 12 is, therefore, set aside. The appeal will, accordingly, stand allowed

to the extent indicated above; however, confirming the finding that what was taken by Lakshmi Ammal is only a life estate. The parties will bear their respective costs.

R.S. —— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *T. Ramaprasada Rao, CJ.*

A Elliah Devar .. *Petitioner**

v.

D Ramakrishnan .. *Respondent.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended* by Act *(XXIII of 1973), section* 10 (3) (c)*—Tenant in essential service—Petition for eviction by landlord—Dimissal of petition as not maintainable—Effect of findings therein* Res judicata *not invocable — Landlord gtting exemption from the Government—Second application for eviction, whether maintainable.*

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act (XXIII of 1973), section 19—Earlier application for eviction — Dismissed as not maintainable — Second application under new set of circumstances, whether barred.*

After an earlier application by the landlord for eviction of his tenant had been dismissed on the ground of his being in essential service, the landlord obtained from the Government exemption under section 29 of the Tamil Nadu Buildings (Lease and Rent Control) Act. Subsequently the landlord filed another application under section 10 (3) (*c*) of the Act for the eviction of the tenant. Both the Rent Controller and the Appellate Authority found, as a fact that the application was *bona fide,* that the hardship which might result to the tenant would not outweigh the advantage which the landlord might gain by reason of the order of eviction and that, in the circumstances of the case, it was just and proper that an order of eviction should be made. A revision petition was filed wherein it was held that the ground of exemption by the Government which enabled the landlord to present this petition for eviction of the petitioner, even though he was

*C.R.P. No. 3185 of 1978. *15th February,* 1979.

In the earlier petition which had gone up to the High Court resulting in an order in C.R.P. No. 349 of 1973, though the main contention was regarding the maintainability of the petition because the tenant was in the essential service, certain fiindings were rendered by the Rent Controller and the Appellate Authority and certain observations were also made by the High Court touching on this issue. But the main petition for eviction filed in the earlier proceedings was dismissed on the ground that it was not maintainable because of the ban contained in section 10 (4) (1) of the Act. Therefore any finding rendered on merits in the earlier proceedings cannot avail the tenant at a stage where the landlord had through the agency of the Government, secured an exemption and gained a privilege to file an application against the tenant notwithstanding the statutory ban under section 10 (4) (1) of the Act. It was not in dispute that the Government gave a concession to the respondent to file the petition taking the building away from the operation of section 10 (4) (1) of the Act. Therefore, a different situation had arisen enabling the landlord to file the present application. In those circumstances the tenant cannot once again plead that the earlier finding on merits, which cannot project itself due to the dismissal of the main application as not being maintainable, cannot be operative as finding which would in turn invoke the principles of *res judicata.* They were findings rendered in a case in which it was not necessary to do so. The main application was dismissed as not maintainable. Therefore, any ancillary finding given therein cannot be relied upon either for any purpose for, it cannot be said to have been adjudicated finally as between the parties in a lawfully instituted action. Therefore it cannot be said that the earlier disposal of C.R.P. No. 349 of 1973 would prevent the landlord from urging his case on merits after he obtained an order under section 29 from the State Government. [*Para.* 13.]

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960 (as amended by Act XXIII of 1973) praying the High Court to revise the Order of the Court of Small Causes (IV Judge), Madras dated 21st October, 1978 and made in H.R.A.

No. 235 of 1978 (H.R.C. No. 350 of 1976 Court of Small Causes (VI Judge), Madras).

K.N. Subramaniam, for Petitioner.

D. Ramakrishnan, for Respondent.

The Court delivered the following

JUDGMENT—In an application filed by the respondent-landlord under section 10 (3) (*c*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, both the Rent Controller and the appellate authority found, as a fact, that the application was *bona fide*, that the hardship which might result to the tenant would not outweigh the advantage which the landlord might gain by reason of the order of eviction and that, in the circumstances of the case, it was just and proper that an order of eviction should be made. It is as against this, the present civil revision petition has been filed.

2. Three contentions are raised before me, namely: (1) that, on an earlier occasion, a similar application was filed for eviction of the tenant under section 10 (3) (2) of the Act for additional accommodation of the portion in the occupation of the petitioner-tenant and that having been dismissed at the High Court level, no further application is maintainable, since it was found in that case that the request of the landlord cannot be accepted as a *bona fide* one, and that, therefore, the present application is barred under section 19 of the Act; (2) that the exemption which the landlord obtained from the State Government under section 29 of the Act permitting him to file the present application, even though the petitioner-tenant is in the essential services, cannot enable the landlord to circumvent the earlier order of the High Court in C.R.P. No 349 of 1973; and (3) that on merits the inconvenience that the tenant might suffer is quantitatively larger than the benefit which the landlord might gain by reason of the eviction.

3. In so far as the first two points are concerned, I am of the view that the grant of the exemption by the Government which enabled the landlord to present this petition for eviction of the petitioner, even though he was in the essential service, clinches the issue. In the earlier petition which went up to the High Court resulting in an order in C.R.P. No. 349 of 1973 the main contention was that the Rent Control Petition for eviction was not maintainable because the tenant-petitioner was in the essential service. While dealing with this, no doubt, certain findings were rendered by the Rent Controller and the appellate authority and certain observations were also made by the High Court touching on this issue. But the main petition for eviction filed in the earlier proceedings was dismissed on the ground that it was not maintainable because of the ban contained in section 10 (4) (1) of the Act. Therefore, any finding rendered on the merits in the earlier proceedings cannot be still made available to the petitioner-tenant in a stage where the landlord has, through the agency of the Government, secured an exemption and gained a privilege to file an application against the tenant-petitioner notwithstanding the statutory ban under section 10 (4) (1) of the Act. It is not in dispute that the Government gave a concession to the respondent to file the petition by taking the building away from the operation of section 10 (4) (1) of the Act. Therefore, a different environment has cropped, which has enabled the landlord to file the present application. This is because of the order passed by the Government under section 29 of the Act. In those circumstances, the petitioner cannot once again plead that the earlier findings on merits, which cannot project itself due to the dismissal of the main application as not being maintainable, cannot be operative as findings which would in turn invoke the principle of *res judicata*. They were findings rendered in a case in which it was not necessary to do so. The main application was dismissed as not maintainable. Therefore, any ancillary finding given therein cannot be relied upon later for any purpose, for, it cannot be said to have been adjudicated finally as between the parties in a lawfully instituted action. I am unable, therefore, to agree with the contention that the earlier disposal in C.R.P. No. 349 of 1973 would prevent the landlord from re-urging his case on merits after he obtained an order under section 29 from the State Government.

4. As regards the third contention it revolves on merits. The finding of both the Courts below is that the landlord needed additional accommodation and that the said need was *bona fide*. The landlord was in the same premises and the tenant was occupying a portion of the downstairs of an extent of 88sq. ft. The landlord wanted it in order to provide for his expanding family and also incidentally make it convenient for him to do

business therein if it is possible. These circumstances were weighed by both the Rent Controller and the appellate authority who came to the conclusion that the hardship which the tenant would be put to in the event of an eviction order being passed will not outweigh the advantage to the landlord. They also found that the tenant could secure easily accommodation for himself and it was also noted that the petitioner's wife, who was an employee in the Corporation, would secure quarters, and that it would conveniently house both the petitioner and his wife. All these circumstances lead to a sure inference that the application was not only *bona fide* but that comparative hardship which the tenant might suffer is so little and that the benefit of the landlord would secure as a result of the eviction will certainly not outweigh the disadvantage to the tenant. All such circumstances were borne in mind by the statutory authorities. The order does not suffer from any error of jurisdiction or any error of law or any material irregularity.

5. The petition is dismissed. The petitioner is granted three months' time to vacate.

R.S. —— *Petition dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.; G. Ramanujam and A. Varadarajan, JJ.*

Natesa Reddiar and another .. *Appellants**

v.

Saradhambal and others .. *Respondents.*

Hindu Women's Rights to Property Act (Central Act XVIII of 1937)—Hindu Women's Rights to Property Act (Extension to Agricultural Lands) (Tamil Nadu Act XXVI of 1947)—Provincial Legislature while making law on devolution of agricultural property incorporating by reference Central Act—Incorporation valid and not unconstitutional.

The Central Act (XVIII of 1937) was in fact not amended after 1947 till date. Therefore there is no question of the future amendments to the Central Act being applied to agricultural lands in the State of Tamil Nadu. It is not possible to assume from the mere adoption of the provisions of the Central Act by the Provincial Legislature that it will automatically result in the application of the Central Act as amended from time to time, to agricultural lands in Tamil Nadu. Mere adoption of the Central Act by extending the definition of "property" in the Act to cover agricultural lands in Tamil Nadu Act (XXVI of 1947) will not automatically mean that the Provincial Legislature has chosen to adopt all future amendments to the Central Act as well. Apart from the fact that there was in fact no future amendment, there does not appear to be any legislative intendment apparent from the provisions of Tamil Nadu Act XXVI of 1947 to extend the provisions of the Central Act to agricultural lands in the State with all its future amendments. It is well-established that in the absence of any intention on the part of the legislature to adopt a law of another legislature with all its future amendments, the usual and normal rule of construction will have to apply. Where a statute is incorporated by reference into a second statute any repeal or amendment of the first statute by a third does not affect the second, as the incorporated provisions have become part of the second statute.

[*Para.* 9.]

* S.A. No. 1645 of 1974. *6th December, 1978.*

The Provincial Legislature in enacting Act (XXVI of 1947) has not expressly said that it is adopting or incorporating the Central Act as part of its Act. But the intention is obvious. The title to the Act clearly indicates that the Legislature has intended to extend the Hindu Women's Rights to Property Act (XVIII of 1937) to agricultural lands. The preamble also indicates that the object of the Act was to extend the operation of the Hindu Women's Rights to Property Act (XVIII of 1937) to agricultural lands in the province of Madras. Having regard to the object of the Act which is to extend the Hindu Women's Rights to Property Act to agricultural lands it could be taken that the legislature intended to adopt the Central Act as part of its legislation by amending the definition of "property" occurring in the Central Act as part of its own legislation so as to include agricultural lands as well. The provincial Legislature can, in its discretion either make an independent law or adopt an existing Act passed by another Legislature if it considers that legislation suitable for its purposes. It is a well-established legislative practice to adopt or incorporate in an Act the provisions of another Act for the purpose of convenient reference. [*Para.* 10.]

When once the Provincial Legislature has got the competence to make a law on devolution of agricultural property, the fact that it has, instead of making an independent legislation, adopted a shortened form of incorporation by reference to a Central Act does not make it unconstitutional. The doctrine of incorporation by reference to an earlier legislation is well known. By extending the definition of "property" in the Central Act which was held not to include agricultural lands on the grounds of absence of legislative competence, the Provincial Legislature cannot be said to have legislated on the topic of devolution of agricultural lands. The object of the enacting Act (XXVI of 1947) was not really for the purpose of making a law on devolution of agricultural lands but its sole purpose was to enable the law made by the Federal Legislature to operate in relation to agricultural lands in the State of Tamil Nadu, thus conferring legislative competence on the Federal Legislature which it did not have. The Provincial Legislature while making the law, however, had decided that rather than making elaborate and long provision in respect of succession to agricultural lands, it can adopt the Central Act in entirety for purposes of convenience and amend the definition of property in the Central Act so as to include agricultural lands as well. It is always open to any legislature, if it so chooses, to adopt any existing piece of legislation made by any other legislative body and apply the same with such modifications as considered necessary to suit its object and purpose, and by such incorporation the Act which has been incorporated becomes an Act passed by it. [*Paras.* 11 *and* 12.]

It is true, the provisions of the Central Act have not been treated as an Act passed by the Provincial Legislature expressly. But such an incorporation has necessarily to be implied having regard to the title and preamble given to the Act which is to extend the provisions of the Central Act to agricultural lands in the State of Tamil Nadu. The adoption or incorporation of the Central Act could have been made by the Provincial Legislature by using more clear and specific language. But so long as the intention to adopt and incorporate the Central Act as part of its legislation is clear then, the Act cannot be held to be incompetent. As the incorporation of Acts passed by one Legislature by another legislative body is permissible the Tamil Nadu Act XXVI of 1947 which by necessary implication adopts and incorporates Central Act XVIII of 1937 is quite valid and it does not suffer from legislative incompetence. [*Para.* 16.]

Cases referred to :—

Hindu Women's Rights to Property Act, In re, (1941) F.C.R. 25; *RM.AR.AR.RM.AR.AR. Umayal Achi* v. *Lakshmi Achi*, (1945) F.C.R. 1: (1945) 1 M.L.J. 108 : A.I.R. 1945 F.C. 25; *Shama Rao* v. *Union Territory of Pondicherry*, (1967) 2 I.T.J. 684 : (1967) 2 An.W.R. (S.C.) 98 : (1967)2 M.L.J.(S.C.)98: (1967) 2 S.C.J. 749 : (1967) 2 S.C.R. 650 : A.I.R. 1967 S.C. 1480; *Krishna Chandra* v. *Union of India*, A.I.R. 1975 S.C. 1389; *State of Madhya Pradesh* v. *M.V. Narasimhan*, (1976) 1 S.C.R. 6: A.I.R. 1975 S.C.1835; *Ram Sarup* v. *Munshi*, A.I.R. 1963 S.C. 533; *A.T. Corporation* v. *Assistant Collector*, (1972) 1 S.C.J. 534 : (1972) 3 S.C.R. 85 : A.I.R. 1972 S.C. 648 ; *Gwalior Rayon Mills* v. *Assistant Commissioner of Sales Tax*, (1974) 2 S.C.R. 879 : A.I.R. 1974 S.C. 1660; *Wod's Estate* Exparte, *Her Majesty's Commissioners of Works and Buildings*, (1886)31 Ch.D. 607; *Jogar*

Mills v. *State*, (1966) 1 S.C.R. 523 : (1967) 1 S.C.J. 98 : A.I.R. 1966 S.C. 416; *Diamond Sugar Mills Ltd.*, v. *The State of Uttar Pradesh*, (1961) 3 S.C.R. 242 : (1961) 1 S.C.J. 652 : A.I.R. 1961 S.C. 652; *Zaverbhai Amaidas* v. *State of Bombay*, (1955) 1 S.C.R. 799 : 1954 S.C.J. 851 : A.I.R. 1954 S.C. 752; *Weston* v. *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, (1896) A.C. 348; *Zoolfikar Ali* v. *Official Trustees*.(1967) 69 B.L.R. 326; *Ranchhoddas Atmaram* v. *Union of India*, (1961) M.L.J. (Crl.) 620 ; (1961) 2 M.L.J. (S.C.) 120: (1961) 2 An.W.R. (S.C.) 120 : (1961) 3 S.C.R. 718 : A.I.R. 1961 S.C. 935.

Appeal against the decree of the Court of the Subordinate Judge, Kancheepuram in Appeal Suit No. 87 of 1973, preferred against the decree of the Court of the District Munsif of Kancheepuram in Original Suit No. 169 of 1971.

S. Balathandapani and *T.K. Rajeswaran*, for Appellants.

R. Krishnamoorthy, D. Raju and *A.R. Lakshmanan*, for Respondents.

This second appeal coming on for hearing on Tuesday the 8th and Wednesday the 9th days of February, 1977 before Mr. Justice V. Ramaswami.

The Court made the following

ORDER.—The defendants 3 and 4 are the appellants. The suit was filed by the first respondents for partition and separate possession of her ¼th share in the plaint schedule properties. The plaint schedule properties are two houses and some agricultural lands. The plaintiff claimed 1/4th share in the properties as the widow of a coparcener, who died on 22nd January, 1947. Her claim in respect of a share in the agricultural lands is based on the provisions of the Hindu Women's Rights to Property Act (XVIII of 1937) as made applicable in respect of agricultual lands by the Tamil Nadu Hindu Women's Rights to Property (Extension of Agricultural Lands) Act (XXVI of 1947). In this second appeal, one of the points raised by the defendants both in the lower appellate Court and in this second appeal is as to the constitutional validity of the Tamil Nadu Act XXVI of 1947. The learned counsel questions the constitutional validity of the Tamil Nadu Act (XXVI of 1947) on the ground of legislative competence of the State Legislature, for according to him, by defining the term "property" as including agricultural land, it is in effect amending the Central enactment. The learned counsel also contended that even otherwise the impugned legislation would amount to an abdication of its legislative power to enact a law on succession relating to agricultural lands, and as such, it is beyond the powers of the State Legislature. Whether these questions have any substance or not, I could not go into then, because of the provisions contained in Article 228-A of the Constitution of India, which required that such questions as to the constitutional validity of a State law shall have to be decided by a Bench of five Judges. Accordingly, the above second appeal will be placed before my Lord the Chief Justice for posting it before a Bench of five Judges as required under Article 228-A of the Constitution of India.

In view of the fact that the constitutional validity of the State Legislature is involved, notice will issue to the Advocate-General under Order 27-A of the Code of Civil Procedure.

The Judgment of the Court was delivered by

Ramanujam, J.—This second appeal has been posted before the Full Bench as the constitutional validity of the Tamil Nadu Hindu Women's Rights to Property (Extension to Agricultural Lands) Act (XXVI of 1947) has been challenged by the appellants herein.

2. The first respondent herein filed the suit O.S. No. 169 of 1971 on the file of the District Munsif, Kancheepuram seeking partition and separate possession of her alleged 1/4th share in the suit properties which consisted of two houses and certain agricultural lands. Her case was that her deceased husband Elumalai Reddiar, defendants 3 and 4, one Kannappa Reddiar, the husband of the second defendant and father of the first defendant and one Devendran were members of a Hindu joint family, that the plaintiff's husband died in the year 1947, that Devendran died in the year 1948 but that the family continues to be joint and therefore she is entitled to claim 1/4th share as the widow of the deceased coparcener, Elumalai Reddiar.

3. The suit was resisted only by defendants 2 and 3. Their case was that after the death

of the two co-parceners, Elumalai Reddiar and Devendran, there was a partition of the joint family properties in the year 1948, that in that partition defendants 1 and 2, defendant 3 and defendant 4 were given a 1/3rd share each in the joint family properties and the plaintiff was given the income from survey No. 449/1 comprising of 90 cents towards her maintenance and that the plaintiff was a willing party to the said partition arrangement. They also contended that in any event the plaintiff cannot claim a share in the agricultural properties on the basis of the provisions of Tamil Nadu Act XXVI of 1947 as the same is constitutionally invalid.

4. Both the Courts below, held, on a due consideration of the evidence adduced in the case, that the alleged partition in the year 1948 set up by the contesting defendants had not been proved and, therefore, the plaintiff being the widow of a co-parcener, is entitled to seek partition and separate possession of her husband's share in the joint family house and properties by virtue of the Hindu Women's Rights to Property Act, XVIII of 1937 and in the joint family agricultural land under the Hindu Women's Rights to Property (Extension to Agricultural Lands) Act XXVI of 1947).

5. In this second appeal the learned counsel seeks to challenge the concurrent findings of fact arrived at by the Courts below on the question as to whether there was an earlier partition as alleged by the contesting defendants in which the plaintiff is said to have agreed to receive maintenance from one parcel of land. However we do not see how those findings could be challenged. We are satisfied that on the materials no other conclusion is possible. Therefore we have to proceed on the basis that the partition alleged by the defendants in the year 1948 has not been established and the joint family continued to be undivided on the date of the suit. That on this basis the plaintiff is entitled to claim a 1/4th share in the non-agricultural properties by virtue of section 3 of the Hindu Women's Rights to Property Act, 1937, hereinafter referred to as the Central Act, has not been disputed by the appellants. But the appellants dispute only the plaintiff's right to claim a 1/4th share in the agricultural lands under the provisions of the Tamil Nadu Act XXVI of 1947, hereinafter referred to as the Tamil Nadu Act on the ground that the said Act is constitutionally invalid and, therefore, the plaintiff cannot claim any rights thereunder. Therefore the only question to be considered now is whether the Tamil Nadu Act XXVI of 1947 is constitutionally invalid.

6. The appellants question the constitutional validity of the Tamil Nadu Act on three grounds: (1) That the Provincial Legislature in enacting Tamil Nadu Act XXVI of 1947 had virtually abdicated its legislative power in favour of the Central legislature by merely amending the definition of the word 'property' occurring in Central Act XVIII of 1937 without making a separate legislation of its own on devaluation of agricultural property; (2) That Central Act XVIII of 1937 having been invalidated with reference to agricultural lands by the Federal Court in In re *The Hindu Women's Rights to Property Act*[1] and *Umayal Achi's case*[2] Tamil Nadu Act XXVI of 1947 is enacted to validate the Central Act with reference to its application to agricultural lands which the Provincial legislature had no competence to do, (3) That in any event the Provincial Legislature cannot directly amend the Central Act though it had the competence to legislate separately on devolution of agricultural lands.

7. Elaborating the first ground Mr. Parasaran learned counsel for the appellants submits as under : Though the Provincial Legislature had the competence to legislate on devolution of agricultural lands under Entry 21, List II of 7th Schedule to the Government of India Act, 1935, it had not chosen to legislate on the topic but was satisfied merely by extending the definition of property occurring in Central Act XVIII of 1937 to agricultural land as well, and by so doing, the Provincial Legislature has adbicated its legislative functions and conferred its legislative power to the Federal Legislature, in that it has not only failed to consider the necessity for any legislation on the topic but it has merely put its seal on a legislation made by the Federal Legislature. The effect of the amendment of the term "property" occurring in the Central Act by the Tamil Nadu Act is that the Central Act with all its future amendments will have operation in the State of Tamil Nadu with reference to agricultural lands. Such acceptance by one legislative body of a legislation made by another legis-

1. (1941) F.C.R. 25.
2. (1945) 1 M.L.J. 198 ; (1945) F.C.R. 1: A.I.R. 1945 F.C. 25.

lative body with all its future amendments, without knowing the scope and ambit of such future amendments, really amounts to an abdication of one's legislative power.

8. In support of the said sub-section, the learned counsel places reliance on a decision of the Supreme Court in *Shama Rao* v. *Union Territory of Pondicherry*[1]. However, we do not see how that decision will be of any assistance to the appellants. In that case the Legislative Assembly of the Union Territory of Pondicherry passed the Pondicherry General Sales Tax Act, 1965 and it received the assent of the President on 25th May, 1965. Section 1 (2) of that Act provided that it would come into force on such dates the Government may by notification appoint. Section 2 (1) provided that the Madras General Sales Tax Act, 1959 as in force in the State of Madras immediately before the commencement of the Act shall extend to and come into force in the Union Territory of Pondicherry subject to certain modifications and adoptions specified in that section. Section 2 (2) provided that the Madras General Sales Tax Rules, 1959, and any other rules made or issued under the Madras Act were to apply to Pondicherry. The Pondicherry Government issued notification dated 1st March, 1966 bringing into force the Madras General Sales Tax Act, 1959 as extended by the Pondicherry Act to Pondicherry from 1st April, 1966. In the meantime the Madras Legislature had amended the Madras Act and consequently it was the Madras Act as amended upto 1st April, 1966 which was brought into force under that notification. It was contended before the Supreme Court that the Pondicherry General Sales Tax Act, 1965 which merely adopted the Madras General Sales Tax Act, 1959 as was in force as on 1st April, 1966 was void and as the Pondicherry Legislature had abdicated its legislative function in favour of the Madras State Legislature by a wholesale adoption of the Madras Act as in force in the State of Madras immediately before the commencement of its Act, and that section 2 (1) read with section 1 (2) of the Pondicherry Act meant that the Pondicherry Legislature adopted the Madras Act not only as it was on 25th May, 1965 when it adopted it but also with such amendment or amendments in that Act which might be passed by the Madras Legislature from 25th May, 1965, the date of its adoption, till 1st April, 1966, the date of commencements of the Act. The Supreme Court took the view that the Pondicherry Legislature not only adopted the Madras Act as it stood on the date of the passing of the Pondicherry General Sales Tax Act, 1965 but also adopted all the amendments which the Madras Legislature may make to the Madras Act from the date of the Pondicherry General Sales Tax Act was passed till the Pondicherry Government may issue a notification of commencement, without knowing the nature and scope of such amendments, and that such adoption of future amendments to the Madras Act by the Pondicherry Legislature without knowing the nature of the amendments amounts to a total surrender in the matter of Sales Tax legislation by the Pondicherry Legislature in favour of the Madras Legislature and therefore the Act was void. We do not see how the principle laid down in that decision will apply here. While passing the Tamil Nadu Act XXVI of 1947, the Provincial Legislature did not adopt either expressly or by necessary implication the future amendments to be made to the Central Act by the Central Legislature.

9. The learned counsel then submits that even if the Provincial Legislature did not expressly adopt the future amendments to the Central Act, the result of expanding the definition of 'property' in the Central Act will virtually result in the application of the Central Act with all its future amendments to agricultural lands in the Province of Madras. We cannot accept the said submission of the learned counsel as correct. Firstly Central Act XVIII of 1937 was in fact not amended after 1947 till date. Therefore there is no question of the future amendments to the Central Act being applied to agricultural lands in the State of Tamil Nadu. Secondly it is not possible to assume from the mere adoption of the provisions of the Central Act by the Provincial Legislature that it will automatically result in the application of the Central Act as amended from time to time, to agricultural lands in Tamil Nadu. As has been held in *Krishna Chandra* v. *Union of India*[1], there is no general principle which precludes either Parliament or a State Legislature from adopt-

1. (1967) 2 I.T.J. 684: (1967) 2 An.W.R. (S.C.) 98: (1967) 2 M.L.J.(S.C.) 98 : (1969) 2 S.C.J. 749 : (1967) 2 S.C.R. 650 : A.I.R. 1967 S.C. 1480.

1. A.I.R. 1975 S.C. 1389.

ing an Act with its future amendments passed earlier by a State Legislature or Parliament, and incorporating them as its legislation and the Indian Legislatures have never accepted any inhibition against or limitation upon enactment by incorporation as such. In *State of Madhya Pradesh* v. *M V. Narasimhan*[1] the Supreme Court has clearly laid down that where a subsequent Act incorporates provisions of an earlier Act, then the borrowed provisions become an integral part of the subsequent Act, and are totally unaffected by any repeal or amendment of the earlier Act, but that such a principle may not apply in exceptional cases such as (*i*) the subsequent Act and the previous Act are supplemental to each other; (*ii*) the two Acts are *in pari materio*; (*iii*) where the amendment in the earlier Act if not imported into the subsequent Act also, it would render the subsequent Act wholly unworkable and in effective; and (*iv*) where the amendment of the earlier Act, either expressly or by necessary intendment applies to the provisions of the subsequent Act. It is, therefore, clear from the above decisions that mere adoption of the Central Act by extending the definition of property in that Act to cover agricultural lands in Tamil Nadu Act XXVI of 1947 will not automatically mean that the Provincial Legislature has chosen to adopt all the future amendments to the Central Act as well. Apart from the fact that there was in fact no future amendments, there does not appear to be any legislative intendment apparent from the provisions of Tamil Nadu Act XXVI of 1947 to extend the provisions of the Central Act to agricultural lands in the State with all its future amendments. It is well established that in the absence of any intention on the part of the Legislature to adopt a law of another Legislature with all its future amendments, the usual and normal rule of construction will have to apply. Where a statute is incorporated by reference into a second statute, any repeal or amendment of the first statute by a third does not affect the second, as the incorporated provisions have become part of the second statute. As pointed out by the Supreme Court in *Ram Sarup* v. *Munshi*[2] where the provisions of an Act are incorporated by reference in a later Act the repeal of the earlier Act has, in general, no effect upon the construction or effect of the Act in which its provisions have been incorporated. It is only in exceptional instances pointed out by the Supreme Court in *State of Madhya Pradesh* v. *M V. Narasimhan*[1] the repeal or amendment of the provisions of the Act which has been incorporated in the later Act will amount to repeal or amendment of the later Act, but not in all cases. We cannot, therefore, agree with the contention of the learned counsel for the appellants that the amendment of the definition of 'property' in the Central Act by Tamil Nadu Act will automatically result in the application of the Central Act to agricultural properties with all its future amendments and, there is no question of abdication or surrender of legislative functions in favour of the Central Legislature by the Provincial Legislature in enacting Tamil Nadu Act XXVI of 1947.

10. The learned counsel further submits that the Provincial Legislature should have passed an independent legislation on devolution of agricultural lands, that it is not open to it to merely expand the definition of 'property' occurring in the Central Act, and that such an expression of the definition cannot be construed as an incorporation of the Central Act by the Provincial Legislature as part of its Legislation. It is true, the Provincial Legislature in enacting Act XXVI of 1947 has not expressly said that it is adopting or incorporating the Central Act as part of its Act. But the intention is obvious. The title to the Act clearly indicates that the Legislature has intended to extend Hindu Women's Right to Property Act (XVIII of 1937) to agricultural lands. The preamble also indicates that the object of the Act was to extend the operation of the Hindu Women's Rights to Property Act XVIII of 1937 to agricultural lands in the Province of Madras. Having regard to the object of the Act which is to extend the Hindu Women's Rights to Property Act to agricultural lands, it could be taken that the Legislature intended to adopt the Central Act as part of its legislation, by amending the definition of 'property' occurring in the Central Act so as to include agricultural lands as well. We are not inclined to agree with the learned counsel for the appellants that the Provincial Legislature had

1. (1976) 1 S.C.R. 6 : A.I.R. 1975 S.C. 1835.
2. A.I.R. 1963 S.C. 533.

1. (1976) 1 S.C.R. 6 : A.I.R. 1975 S.C. 1835.

to pass an independent law without reference to the Central Act if it wanted to legislate on devolution of agricultural lands. The Provincial Legislature can, in its discretion either made an independent law or adopt an existing Act passed by another Legislature if it considers that legislation suitable for its purposes. It is a well established legislative practice to adopt or incorporate in an Act the provisions of another act for the purpose of convenient reference. In *A.T. Corporation* v. *Assistant Collector, Customs*[1], the Supreme Court has observed :

> "It is well-accepted legislative practice to incorporate by reference, if the Legislature so chooses, the provisions of some other Act in so far as they are relevant for the purpose of and in furtherance of the the scheme and objects of that Act...."

Referring to *Shama Rao's case*[2], relied on by the appellants, the Supreme Court in *Gwalior Rayon Mills* v. *Assistant Commissioner, Sales Tax*[3], observed :

> "We think that the principle of the ruling in *Shama Rao's case*[2] (viz. Shama Rao) must be confined to the facts of the case. It is doubtful whether there is any general principle which precludes either Parliament or a State Legislature from adopting a law and the future amendments to the law passed respectively by a State Legislature or Parliament, and incorporating them in its legislation. At any rate, there can be no such prohibition when the adoption is not of the entire corpus of law on a subject but only of a provision and its future amendments and that for a special reason of purpose."

11. That the Legislature can, if it so chooses, adopt the provisions of an existing Act and incorporate the same as part of its Act for purpose of convenience can no longer be in dispute. In *Krishna Chandra* v. *Union of India*[4], it was pointed out :

> "It is a far constitutional cry from this position to the other proposition that where Parliament has power to enact on a topic actually legislates within its competence but, as an abbreviation of drafting, borrows into the statute by reference the words of a State Act not *qua* State Act but as a convenient short hand, as against a long hand writing of all the sections into the Central Act, such legislation stands or falls on Parliament's legislative power, *vis-a-vis* the subject *viz.*, mines and minerals. The distinction between the two legal lines may sometimes be fine but always is real."

It is therefore clear that once the Provincial Legislature has got the competence to make a a law on devolution of agricultural property, the fact that it has, instead of making an independent legislation, adopted a shorthand form of incorporation by reference to a Central Act does not make it unconstitutional. The doctrine of incorporation by reference to an earlier legislation is well-known and it has been very aptly described by Lord Esher, in In re, *Wod's Estate* Ex parte *Her Majesty's Commissioners of Works and Buildings*[1], thus :

> "If a subsequent Act brings into itself by reference some of the clauses of a former Act the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen or printed in it, and, the moment you have those clauses in the later Act, you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes, therefore, those sections of the Act of 1840 are to be dealt with as it they were actually in the Act of 1855."

In view of the above discussion, the first contention of the appellants has to be rejected.

12. As regards the second contention that the Act is intended to validate Central Act XVIII of 1937 which been held to be inapplicable to agricultural lands by the Federal Court, and that the Provincial Legislature has no power to make such a validating law, the submission of the learned counsel is this: The Act is intended in to get over the decision of the Federal Court and to cure the legislative incompetence of the Federal Legislature. By extending the definition of property in the Central Act which was held

1. (1972) 1 S.C.J. 534 : (1972) 3 S.C.R. 85 : A.I.R. 1972 S.C. 648.
2. (1967) 2 I.T.J. 684 : (1967) 2 An.W.R. (S.C.) 98 : (1967) 2 M.L.J. (S.C.) 98. : (1967) 2 S.C.J. 749 : A.I.R. 1967 S.C. 1480.
3. (1974) 2 S.C.R. 879 : A.I.R. 1974 S.C. 1660.
4. A.I.R. 1975 S.C. 1389.

1. (1886) 39 Ch.D. 607 at 15, 616.

not to include agricultural lands on the ground of absence of legislative competence, the Provincial Legislature cannot be said to have legislated on the topic of devolution of agricultural lands. The object of enacting Act XXVI of 1947 was not really for the purpose of making a law on devolution of agricultural lands but its sole purpose is to enable the law made by the Federal Legislature to operate in relation to agricultural lands in the State of Tamil Nadu, thus conferring Legislature competence on Federal Legislature which it did not have.

13. The learned counsel, in support of that submission refers to certain observations in the decision in *Jogar Mills* v. *State*[1] which are to the effect that Parliament cannot validate an invalid State Act by conferring legislative competence on the State Legislature which it did not possess. In that case the facts were entirely different. Under the Madhya Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1958, a cess was levied on sugarcane. In *Diamond Sugar Mills Ltd.* v. *The State of Uttar Pradesh*[2], the Supreme Court held that such a levy was not valid as the State Legislature had no legislative competence to impose the levy. Similar Acts enacted by several other States also suffered from the same infirmity. To meet the situation, the Parliament passed the Sugarcane Cess (Validation) Act, (XXXVIII VIII of 1961). By section 3 of that Act all the assessments and collections made before its commencement under the various State Acts had been validated and all the provisions of the State Acts as well as the relevant notifications, rules etc, made under the State Acts were treated as part of section 3 from the relevant dates when the State Acts were passed. The validity of the said validation Act was questioned before the Supreme Court *inter alia* on the ground that the Validation Act is only to cure the incompetence of the State Legislature and not to levy a cess by the Parliament itself and, therefore, it was a colourable piece of legislation. The Supreme Court held that so long as the Parliament had the legislative competence to deal with the subject-matter under section 3 of the Sugarcane (Validation) Act, 1961, it cannot be challenged on the ground that the benefit under the Act goes to the States and not to the Centre, that the said section 3 cannot be taken to validate the invalid State statutes but has to be taken to be a law concerning the cess covered by the State statutes and that the Parliament instead of making elaborate and long provisions in respect of the recovery of cess had decided to make a compendious provision such as is contained in section 3 for the sake of brevity and convenience. The Supreme Court observed that the plain meaning of section 3 is that all the material provisions of the State Acts as well as the notifications orders and rules issued thereunder are included in it and shall be deemed to have been so included at all material times, and therefore the Act cannot be taken to be a colourable piece of legislation and that to hold otherwise would be to cut down the width and amplitude of the legislative competence conferred on Parliament by the relevant entry in List I of the 7th Schedule. The Supreme Court further observed that the validity of an Act must be judged in the light of the legislative competence of the Legislature which passes the Act or with reference to the question as to whether the fundamental rights of the citizens have been improperly contravened or other considerations which may be relevant in that behalf, and that it will be inappropriate and indeed illegitimate to hold an enquiry into the manner in which the funds raised by an Act would be dealt with. This decision of the Supreme Court far from supporting the appellant supports the respondent's contention that the validity of Tamil Nadu Act XXVI of 1947 has to be considered only with reference to the legislative competence and not with reference to the form of its legislation has taken.

14. No doubt, the Central Act has been held by the Federal Court to be inapplicable to agricultural lands as the Federal Legislature had no legislative competence to enact a law on devolution of agricultural lands. On taking note of the said decision, the Provincial Legislature having the requisite legislative competence felt that it was not expedient to have two rules of succession, one with regard to agricultural lands and the other with regard to other species of property and, therefore, passed the Madras Act XXVI of 1947 to remedy the decision of the Federal Court and to apply Central Act to agricultural lands in the State. We do not see how the passing of the said Act could be construed as conferment of legislative competence on

1. (1967) 1 S.C.J. 98 : (1966) 1 S.C.R. 523 : A.I.R. 1966 S.C. 416.

2. (1961) 1 S.C.J. 652 : (1961) 3 S.C.R. 242 : A.I.R. 1961 S.C. 652.

Federal Legislature by the Provincial Legislature. There is also no question of validating the Central Act or curing any defect therein by the Provincial Legislature. The Provincial Legislature taking note of the decision of the Federal Court that the power to make a law in relation to devolution of agricultural lands was with the Provincial Legislature, has itself chosen to make a law on devolution of agricultural lands by adopting the Central Act and making suitable amendments thereto. The Provincial Legislature while making the law, however, had decided that rather than making elaborate and long provisions in respect of succession to agricultural lands, it can adopt the Central Act in entirety for purpose of convenience and amend the definition of "property" in the Central Act so as to include agricultural lands as well. It is always open to any Legislature, if it so chooses, to adopt any existing piece of legislation made by any other legislative body and apply the same with such modifications as considered necessary to suit its object and purpose, and by such incorporation the Act which has been incorporated becomes an Act passed by it. Therefore the second contention also fails.

15. The third contention put forward by the learned counsel is based on the following observation of the Supreme Court in *Zaverbhai Amaidas* v. *The State of Bombay*[1] :

"Discussing the nature of the power of the Dominion Legislature, Canada, in relation to that of the Provincial Legislature, in a situation similar to that under section 107 (2) of the Government of India Act, it was observed by Lord Watson in *Attorney-General for Ontario* v. *Attorney General for the Dominion*[2], that though a law enacted by the Parliament of Canada and within its competence would override Provincial legislation covering the same field, the Dominion Parliament had no authority conferred upon it under the Constitution to enact a statute repealing directly any Provincial statute. That would appear to have been the position under section 107 (2) of the Government of India Act with reference to the subjects mentioned in the Concurrent List."

1. 1954 S.C.J. 851 : (1955) 1 S.C.R. 799 at 806 : A.I.R. 1954 S.C. 752.
2. (1896) A.C. 348.

The above observations have been made while considering the scope of section 107 (2) of the Government of India Act which corresponds to Article 254 (2) of the Constitution. In this case we are not concerned with a legislative entry in the Concurrent List but are concerned only with the Entries in List II of Schedule 7 which is exclusively the State field. There is also no question of repugnancy arising in this case between the Central Act and the Provincial Act. As a result of the decision of the Federal Court holding the Central Act to be applicable only to non-agricultural properties the Provincial Legislature, in exercise of its legislative power, is empowered to enact, if it so chooses, similar law for devolution of agricultural lands, which subject is within its exclusive field. There is therefore, no question of the Central as well as the State Act operating in the same field and it is only in such cases either section 107 (2) of the Government of India Act or Article 254 (2) of the Constitution will come into play. Therefore the above observations of the Supreme Court cannot be taken advantage of by the appellants to question the validity of Tamil Nadu Act XXVI of 1947 on the ground that the Provincial Legislature cannot directly amend the Central Act. Even in the area in which Article 254 (2) operates, the said observations are as such not binding under Article 141, *Zoolfikar Ali* v. *Official Trustees*.[1] In that case a Division Bench has held that the said observations of the Supreme Court in *Zaverbhai's case*[2] cannot be taken to be even *obiter dicta*. The Supreme Court itself has recently pointed out in *Ranchhoddas V. Atmaram* v. *Union of India*[3] that an opinion on a question never required to be decided by the Supreme Court cannot be treated as having been decided by it so as to become a binding decision. It is however unnecessary to go into the question as to the binding nature of the said observations made by the Supreme Court in *Zaverbhai's case*[2] as we are of the view that the question whether the State Legislature could adopt and incorporate an Act passed by the Central Legislature by making suitable amendments thereto can be

1. (1967) 69 B.L.R. 326.
2. 1954 S.C.J. 851 : (1955) 1 S.C.R. 799.
3. (1961) M.L.J. (Crl.) 620 : (1961) 2 M.L.J. (S.C.) 120 : (1961) 2 An. W.R. (S.C.) 120 : (1961) 3 S.C.R. 718 : A.I.R. 1961 S.C. 935.

taken to be concluded by the two decisions of the Supreme Court in *Jâpra Sugar Mills* v. *State*[1] and *Krishna Chandra's case*.[2] In these cases the Parliament adopted and incorporated the provisions of certain State Acts which had been declared invalid for want of competence while legislating on a subject within its competence and such incorporation was upheld. The first decision has already been referred to in detail. In the second decision Parliament had in exercise of its legislative power enacted the Bihar Land Reforms Laws (Regulating Mines and Minerals) Validation Act, 1969, with a view to validate an invalid law passed by the Bihar Legislature by re-enacting the State Act with retrospective effect in its own right. An attack was made on the constitutional validity of the said Central Act on the ground that the Parliament cannot validate a law passed by an incompetent State Legislature, that such validation amounts to conferment of legislative competence by Parliament on the State Legislature which it did not possess under the Constitution, and that validation by a subsequent Act of a competent Legislature can only be by a subsequent law enacting the provisions of the State Act expressly or by incorporation. The Supreme Court while rejecting the said objection pointed out that though the Parliament cannot confer competence on State Legislature which it did not have under the Constitution to make a law in respect of matters falling outside the State List, it has the power to enact a law on a topic within its competence by adopting the provisions of the State Act, not *qua* State Act but as a convenient short-hand, as against a long-hand writing of all the sections into the Central Act. In that case section 2 (1) of the Validating Act passed by the Parliament said: that the laws specified in the Schedule shall be deemed always to have been as valid as if the provisions contained therein had been enacted by Parliament. This section was construed by the Supreme Court as a re-enactment by the Parliament of a law on the same topic of Mines and Minerals which was covered by the Bihar Act which had been declared to be invalid by the Supreme Court. The said decistion is also an authority for the proposition that Parliament instead of making afresh or independent legislation on a topic within its competence can adopt and incorporate even an invalid State law on the same topic if the Parliament so chooses. Here we have a converse case. The Central Act is a piece of legislation by the Federal Legislature in respect of a topic within its competence, that is in respect of succession to non-agricultural properties. The Provincial Legislature while enacting a law on devolution of agricultural lands adopted and incorporated as part of its legislation the Central Act. The decisions of the Supreme Court in *Japra Sugar Mills case*[1] and *Krishna Chandra's case*[2] have gone to the extent of prmitting the Legislature to adopt and incorporate as part of its legislation an invalid piece of legislation passed by the State. But there is an *a fortiori* case where the Central Act has not been invalidated and, the Provincial Legislature had following a well-established legislative practice, adopted and incorporated as part of its legislation the provisions of the Central Act.

16. Mr. Parasaran would say that the Tamil Nadu Act XXVI of 1947 does not in terms incorporate the provisions of Central Act XVIII of 1937 by reference but it merely amends the definition of 'property' contained in that Act. It is true, the provisions of the Central Act have not been treated as an Act passed by the Provincial Legislature expressly. But such an incorporation has necessarily to be implied having regard to the title and preamble given to the Act which is to extend the provisions of the Central Act to agricultural lands in the State of Tamil Nadu. The adoption or incorporation of the Central Act would have been made by the Provincial Legislature by using more clear and specified language. But so long as the intention to adopt and incorporate the Central Act as part of its legislation is clear then, the Act cannot be held to be incompetent. How far a careless and imperfect drafting of the Bill will affect the legislation has been referred to by the Supreme Court in the following passage in *Krishna Chandra* v. *Union of India*.[2]

> "No doubt, there is some remissness in the drawing up of what professes to be a validating law and the neglected art of drafting bills is in part the reason for subtle length of submissions where better

1. (1966) 1 S.C.R. 523 : (1967) 1 S.C.J. 98.
2. A.I.R. 1975 S.C. 1389.

1. (1966) 1 S.C.R. 523 : (1967) 1 S.C.J. 98.
2. A.I.R. 1975 S.C. 1389.

skill could have made the sense of the statute lucent and its validity above-board. Informed by a realistic idea of shortfalls in legislative drafting and of the social perspective of the statute but guided primarily by what the Act has said explicitly or by necessary implication, we will examine the meaning and its impact on counsel's contentions."

As the incorporation of Acts passed by one Legislature by another legislative body is permissible we have no doubt that the Tamil Nadu Act XXVI of 1947, which by necessary implication adopts and incorporates Central Act XVIII of 1937 is quite valid and it does not suffer from legislative incompetence.

17. The result in the second appeal fails and is dismissed. There will, however, be no order as to costs.

R. S. — *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Maheswaran, J.*

M/s. Kolapur Traders, Vellore by partner Gandhibai .. *Petitioner**

v.

Subramania Mudaliar .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act (XXIII of 1973), section 10 (c) (iii)—Lawyer owning premises in occupation of tenant doing jaggery business —Petition for eviction of tenant alleging requirement of the landlord for carrying on his legal profession—Legal profession, whether a "business"—Petitioner held not entitled to an order for eviction.

The owner of a building who was a lawyer filed a petition against a firm doing business in jaggery and occupying the premises belonging to the lawyer, for eviction, on the ground that he required the premises for a *bonafide* business, namely to set up his practice. The Rent Controller ordered eviction accepting the case of the landlord and the Appellate Authority also confirmed the order of eviction passed by the Rent Controller. On revision to the High Court,

Held, that there is a fundamental difference between 'profession' and 'trade or business'. The words 'trade' and 'business' do not mean the same thing. While all trades may be business, all business is not trade. The distinction between 'business' and 'profession' is emphasised in rule 40 of the Rules made by the Bar Council of India. The rule says that an advocate shall not personally engage in 'business' and he may be a sleeping partner in a firm, if in the opinion of the appropriate state Bar Council the nature of business is not inconsistent with the dignity of the profession. It is therefore clear that the two terms "profession" and "business" are not synonymous. An advocate is approached by his client in regard to his problems with reference to his property, his trade, business, or industry and sometimes with regard to problems relating to his freedom and it is expected that an advocate would be in a position to help him in his difficulties to the best of his ability and not betray the confidence reposed in him. This is one of the elements which should be borne in mind in considering whether a particular person is practising a 'profession' or is merely doing a 'business'. The profession of an advocate involves a high Code of ethics and very considerable responsibility. The profession of an advocate constitutes a learned 'profession' which cannot be terned as 'business' within the definition of section 10 (3) (*c*) (iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act. Therefore the landlord who is an advocate cannot apply under section 10 (3) (*c*) (iii) of the Act for eviction the tenant from the premises on the ground that the respondent requires the same for "locating his office." [*Para.* 7.]

Cases referred to :—

Fraser & Ross v. *Sambasiva Iyer*, (1968) 68 I.T.R. 279 : I.L.R. (1968) 3 Mad. 655 : (1968) I M.L.J. 361 : (1968) 1 Comp.L.J. 152 : A.I.R. 1969 Mad. 134; *National Union of Commercial Employees* v. *Mehar*, (1962) 1 Lab L.J. 241 : A.I.R. 1962 S.C. 1080; *Commissioners of Inland Revenue* v. *Mase*, (1919) 1 K.B. 647 ; *N.E. Merchant* v. *Bombay Municipal Corporation*, (1967) Bom. L.R. 758; *Taimel* v. *Laxaman Sewak Surey*, (1972) R.C.J. 1; *Sethuraman* v. *Meenakshi*, A.I.R. 1967 Ker. 88; *Rolls* v. *Miller*, 27 Ch. D.71.

*C.R.P. No. 2405 of 1976. 30th January, 1979.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960 (as amended by Act XXIII of 1973; praying the High Court to revise the order of the Court of the Principal Subordinate Judge, Vellore dated 20th July 1976, and made in C.M.A. No. 65 of 1975 (RCOP No. 35 of 1975– Rent Controller, Vellore.

V. Ratnam, for *T.S. Viswanatha Rao* and *A.G. Gajapathy*, for Petitioner.

I. Dhanyakumar for *K.N. Balasubramaniam* for Respondent.

The Court made the following

ORDER:—The revision petitioners are tenants in respect of premises No. 48, Bogipattarai Street, Vellore and they are carrying on business in jaggery. They were let into possession by the father of the respondent. The property fell to the share of respondent. The respondent who is an Advocate practising at Vellore requires the premises for the purpose of locating his chambers. The revision petitioners are keeping the premises locked and also require a pagadi of Rs. 5000 and therefore the respondent filed a petition for eviction of the revision petitioners before the Rent Controller, Vellore.

2. The application was resisted by the revision petitioners, who *inter alia* contended that the building is not suited for running the office of an Advocate and that the notice terminating the tenancy is not valid. The Rent Controller ordered eviction as, in his view, the requirement of the landlord of the premises was for the *bona fide* purpose of setting up his practice. In appeal, the Appellate Authority confirmed the finding and dismissed the appeal. The revision petitioner is aggrieved and has filed this revision.

3. It is contended before me for the revision petitioners that the profession of an Advocate is not a "business" within the meaning of the Rent Control Act and therefore the order of eviction is wrong. The petition is one filed under section 10 (3) (*a*) (iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act. Section 10 (3) (*a*) (iii) runs thus :

"A landlord may, subject to the provisions of clause (*d*), apply to the Controller for an order directing the tenant to put the landlord in possession of the building....

* * * * *

(*iii*) in case it is any other non-residential building, if the landlord or any member of his family is not occupying for purposes of a business which he or any member of his family is carrying on, a non-residential building in the city, town or village concerned which is his own."

The averments in the petition show that the petitioner is a practising Advocate at Vellore and is not occupying for purposes of his profession any other non-residential building in the town, which is his own. These facts are not disputed. I may also here point out that the contention that the building in question cannot be used as a chamber of an advocate is not pressed before me. It is contended for the petitioner by his counsel that the profession of an advocate is a "learned profession" and the essential idea of a "learned profession" is pursuit of an avocation or occupation substantially involving the intellect and the same is characterised by equipment of learning, skill or judgment acquired through intellectual means, the employment of capital for this purpose being largely subsidiary or incidental in character. This contention requires examination.

4. In *Fraser & Ross* v. *V. Sambasiva Iyer*,[1] a Bench of this Court extracted observations of the Supreme Court in *National Union of Commercial Employees* v. *Mehar (Industrial Tribunal Bombay) and others.*[2] The observations of their Lordships of the Supreme Court in the said ruling are :

"A person following a liberal profession does not carry on his profession in any intelligible sense with the active co-operation of his employees and the principal, if not the sole, capital which he brings into his profession is his special or peculiar intellectual and educational equipment. That is why on broad and general considerations which cannot be ignored, a liberal profession like that of an attorney must, we think he deemed to be outside the definition of 'industry' under section 2 (*j*) of the Industrial Disputes Act".

5. Scrutton L.J. observed in *Commissioner of Inland Revenue* v. *Mase*[3] that the essential idea of "learned profession" which cannot, in the

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1. (1968) 68 I.T.R. 279 : I.L.R. (1968) 3 Mad. 655 : (1968) 1 M.L.J. 361 : (1968) 1 Comp. L.J. 152: A.I.R. 1969 Mad. 134.
2. (1962) 1 L.L.J. 241 : A.I.R. 1962 S.C. 1080.
3. (1919) 1 K. B. 647.

modern context, be merely limited to the original categories of Church, Medicine and Law, is that it is the pursuit of an avocation or occupation, substantially involving the intellect. In *Fraser and Ross* v. *Sambasiva Iyer*,[1] the learned Judges referred to a passage in *N.E. Merchant* v. *Bombay Municipal Corporation*[2] and extracted what in their opinion is, "Perhaps the best account of the profession and its setting. This account which is extracted by the learned Judges runs thus :

> "We further think that in considering whether an activity is a profession or not, we may perhaps be guided by the fact that the Church, the Medicine and the Law have been for centuries regarded as learned professions. In each of these three, the individual activity is characterised by personal skill and intelligence and is dependent on personal study, character and integrity. These qualities displayed by the practitioners of these learned professions inspire confidence in persons approaching them for advice or guidance. The first is approached for spiritual comfort and guidance, the doctor for physical or mental ailment and the lawyer for legal advice. But in each case the person who approaches them chooses them according to his own conception of the skill, intelligence and integrity of the person approached, and since he approaches in entire confidence, the priest, the doctor and the lawyer have a corresponding obligation not to betray the confidence and advise his client as best as he can. The same element of trust and confidence must be a test in more or less degree in modern professions.'

These observations very clearly show that the profession of an advocate is a "learned profession". Learned counsel appearing for the respondent pointed out that the word "business" in section 10 (3) (*a*) (iii) of the Act is wide enough to include any profession including the profession of law. In support, he invited my attention to the rulidg in *Taimal* v. *Laxaman Sewak Surey and others*[3] Sen, J., of the Madhya Pradesh High Court was of the view that "the word "business" in section 12 (1) (*f*) of the Madhya Pradesh Accommodation Control Act, 1960 is used in a wider sense and is not there synonymous with trade or commerce" and it means anything as distinguished from "pleasure". In *Sethuraman* v. *Meenakshi*[1], Menon CJ. and Govindan Nair, J., were of the view that the expression "Profession" is confined to the practice of theology, law and medicine, that with the extension of application of science and learning, the expression has come to cover other vocations as well, but the dividing line between what is a "profession" and what is a "trade" or "business" still subsists. They are of further view that the expression "trade" or "business" as it is understood connotes a commercial activity, but the expression "profession" does not and is virtually at the other end of the scale, that the word "business" and the expression "trade" or "business" occurring in the proviso to section 11 (3) of Kerala Buildings and Rent Control Act (II of 1965), will not include the profession of an advocate. *Fraser & Ross* v. *Sambasiva Iyer*[2] was a case in the domain of industrial law and the question that arose for consideration was whether a firm of chartered accountants and auditors which is conducting the profession will be an "industry" within the scope of section 2 (*j*) of the Industrial Disputes Act. The term "industry" is defined as any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen. The learned Judges held that the chartered accountants and auditors will constitute a learned or liberal profession and it cannot be termed an industry as defined in section 2 (*j*) of the Industrial Disputes Act, 1947.

6 The learned counsel appearing for the respondent invited my attention to the meaning of the word "business" in the Law Lexicon of Ramanatha Aiyar. The word "business" is defined, as follows: An affair requiring attention and care, that which business occupies one's time, attention and labour as his chief concern; mercantile pursuits; that which one does for a livelihood; occupation; employment as the business of a merchant; the business of agriculture.

7. Lindley, L.J., in *Rolls* v. *Miller*[3] observed thus:

1. (1968) 1 M.L.J. 361: 68 I.T.R. 279.
2. (1967) Bom. L.R. 758.
3. (1972) R.C.J. 1.

1. A.I.R. 1967 Ker. 88.
2. (1968) 1 M.L.J. 361: (1968) 1 Comp. L.J. 152: 68 I.T.R. 279: I.L.R. (1968) 3 Mad. 655.
3. 27 Ch. D. 71 at 88.

"When we look into the dictionaries as to the meaning of the word 'business' I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure; anything which is an occupation or duty which requires attention is a business we do not think. We cant get much aid from the dictionary."

The reference should look at the object with which the word "business" is used in section 10 (3) (*a*) (iii). I am inclined to adopt the view taken by Menon CJ., and Govindan Nair, J., in *Sethuraman* v. *Meenakshi*[1] that the profession of an advocate is not a business. This decision of the Kerala High Court was sought to be distinguished by Sen, J., in *Taramal* v. *Laxman Sewak Surey and others*[2]. The learned Judge distinguishes the said ruling in the following terms.

"I am aware that Menon C.J., and Govindan Nair, J., in *Sethuraman* v. *Meenakshi*[1] have taken a somewhat different view but that decision is hardly of any assistance because the language of section 11 (3) of the Kerala Buildings (Lease and Rent Control) Act, 1965, was different. The expression used in the Act was "trade or business". Now, the association of the wider word "business" with the word "trade" of a narrower significance brings into play a different rule of construction."

With great respect to the learned Judge, I am unable to understand how a mere association of a wider word with a word of narrower significance would bring into play a different rule of construction altogether. It is nobody's contention that an advocate's profession will be covered by the word "trade". There is certainly a fundamental difference between profession and trade or business. I am aware that the words "trade" or business" do not mean the same thing. While all trades may be business, all business is trade. The distinction between "business" and "profession" is emphasised in rule 40 of the Rules made by the Bar Council of India. The rule says that an advocate shall not personally engage in business and he may be a sleeping partner in a firm, if in the opinion of the appropriate State Bar Council the nature of the business is not inconsistent with the dignity of the profession. It is therefore clear that the two terms "profession" and "business" are not synonymous. An advocate is approached by his client in regard to his problems with reference to his property, his trade, business, or industry and sometimes with regard to problems relating to his freedom and it is expected that an advocate would be in a position to help him in his difficulties to the best of his ability and not betray the confidence that is reposed in him. This is one of the eleiments which should be borne in mind in considering whether a particular person is practising a profession or is merely doing a business. The profession of an advocate involves a high code of ethics and very considerable responsibility. I am therefore of the view that the profession of an advocate constitutes a learned profession which cannot be termed as business within the definition of section 10 (3) (*a*) (iii) of the Act. Therefore the respondent landlord who is an advocate cannot apply under section 10 (3) (*a*) (iii) of the Act for the eviction of the revision petitioner from the premises on the ground that the respondent requires the same 'for locating his office'. There is no other contest in this application. The revision has therefore to be allowed and is hereby allowed. The orders of the Courts below are set aside and the Rent Control Original Petition is dismissed. There will be no order as to costs in this revision.

R.S. —— *Petitions allowed*

1. A.I.R. 1968 Ker. 88.
2. (1972) R.C.J. 1.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

Boologanathan .. *Petitioner**

v.

P. Govindarajan and others .. *Respondents.*

Tamil Nadu City Tenants' Protection Act (III of 1922), section 9—Transfer of Property Act (IV of 1882), section 111 (g)—Tenant denying title of landlord — Jus tertii*—Relationship of landlord and tenant snapped—Thereafter money paid for rent would be damages for use and occupation —Tenant cannot claim benefit under the City Tenants' Protection Act.*

If once a tenant openly denies the title of the lessor or pleads *jus tertii,* then it automatically follows that he would not be considered as a tenant for any purpose whatsoever, as under section 111 (*g*) of the Transfer of Property Act by such open denial of title or by pleading *jus tertii,* there is a forfeiture of the tenancy and the relationship of landlord and tenant is snapped thereby. The fact that he remains in possession of the premises and pays, what according to him, is rent or is prepared or willing to pay such rent, could only, in the circumstances, be understood as money paid towards damages for use and occupation. Juridical possession, therefore, is the essence for the creation of the relationship of landlord and tenant. Once there is a snapping of the relationship by a voluntary act of omission or commission on the part of the person in occupation as tenant then, he cannot inconsistently claim such a legal status under any provision of law. [*Para.* 3.]

Once there is a denial of the landlord's title the relationship of landlord and tenant gets automatically severed and the latter cannot take advantage of the statutory benefits under the City Tenants' Protection Act. [*Para.* 3.]

Case referred to:—

Veerasami Naicker v. *Alamelu Ammal,* (1965) 2 M.L.J. 188: I.L.R. (1966) 1 Mad. 177: 78 L.W. 281: A. I. R. 1965 Mad. 442.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Judge, West Thanjavur, dated 18th February, 1974 in C.M.A. No. 29 of 1972.—O.P. No. 48 of 1965, Sub-Court, Thanjavur.

S. Jagadisa Iyer, for Petitioner.

T. R. Rajagopalan, for Respondents.

The Court made the following

ORDER.—This Civil Revision Petition is against the order of the learned District Judge, West Thanjavur. The petitioner claims to be a legatee under a will of the quondam tenant of the suit land. The quondam tenant, namely, the testator, when he was confronted with a suit for ejectment by the owners of the land, filed an application under section 9 of the Tamil Nadu City Tenants' Protection Act (hereinafter called the Act). Before the application could be disposed of, he died. The present petitioner was brought on record as the legatee under the will referred to above. The petitioner wanted to continue the said application under section 9 of the Act and, on the foot of his status as the legatee of the lease-hold rights, claimed such protection after the death of the testator. It was this application which came up for consideration before the lower Court. It may be incidentally pointed out that in an earlier proceedings which was initiated by the respondents but undert the Tamil Nadu Buildings (Lease and Rent Control) Act, against the testator referred to above (the quondam tenant), the plea was one of denial of title of the landlord. It was in these circumstances, the parties were referred to a civil suit. This compelled, therefore, the respondents as landlords to file a suit for possession or ejectment. Taking advantage of such a suit in

*C.R.P. No. 3284 of 1974.   *5th January,* 1979.

ejectment the petitioner and the quoandam tenant desired to secure protection under the City Tenants Protection Act and, as already stated, filed the necessary application for obtaining relief, to wit, an application under section 9 of the Act. I have already referred to the fact that the quondam tenant died during the pendency of the proceedings and the petitioner brought himself on record as legatee under the will of the quondam tenant and wanted to continue the application under section 9. This application was heard by the Court below which framed two posers as arising from the pleadings, firstly, whether the petitioner was entitled to the benefits of section 9 of the Act, and secondly whether the petitioner, as legatee of the quondam tenant, can claim the benefits of the Act. The lower Court, as appellate Court, agreed with the trial Court that the petitioner was not so entitled to the benefits under the Act. As against this, the present civil revision petition has been filed.

2. Though two questions do arise in this Civil Revision Petition, it appears to me to be sufficient, for the purpose of the disposal of the Civil Revision Petition, to deal with the question whether the petitioner as legatee of the quondam tenant who denied the title of the respondents in the proceedings, is entitled at all to be treated as a tenant within the meaning of section 2 of the Act, and entitled to the consequential statutory benefits thereunder. If this is held against the petitioner, then it is unnecessary to consider the other question whether the petitioner, as a legatee, pure and simple, would be entitled to such protection.

3. If once a tenant openly denies the title of lessor or pleads *jus tertii*, then it automatically follows that he would not be considered as a tenant for any purpose whatsoever, as under section 111 (*g*) of the Transfer of Property Act, by such open denial of title or by pleading *jus tertii* there is a forfeiture of the tenancy and the relationship of landlord and tenant is snapped thereby. The fact that he remains in possession of the premises and pays, what according to him, is rent or is prepared or willing to pay such rent, could only, in the circumstances, be understood as money paid towards damages for use and occupation. Juridical possession, therefore, is the essence for the creation of the relationship of landlord and tenant. Once there is a snapping of the relationship by a voluntary Act of omission or commission on the part of the person in occupation as tenant then, he cannot inconsistently claim such a legal status under any provision of law. A Division Bench of this Court in *Veerasami Naicker* v. *Alamelu Ammal*[1], held that where a person, who continues to be in possession after the termination of the tenancy, claims that he does so, as he is entitled to the property as his own, it is obvious that there is hardly any room for such an owner to seek protection of his possession under the provisions of the Act. Clearly the Act is not intended to protect such owners, for, there is no need for it. The argument of the learned counsel for the petitioner, however, is that he satisfied the definition of 'tenant' within the meaning of section 2 (4) (*i*) of the Act. That sub-clause reads as under—

> "Tenant in relation to any land means a person liable to pay rent in respect of such land under a tenancy agreement, express or implied."

Admittedly, there is no express agreement in this case; nor it it set up by the petitioner who is only a legatee of the quondam tenant. But, what is urged is that there is an implied tenancy because he is ready and willing to pay the rent to the respondents. It is said that such a gesture on his part would create the legal relationship of landlord and tenant as between the respondents and himself. This would be begging the question for the simple reason that a person cannot approbate and reprobate. Once the quondam tenant took up the position that the respondents are not the true owners of the property and this necessitated the respondents to file an independent suit as has been the position in this case and during the course of the proceedings the petitioner substitutes himself in the place of the quondam tenant as the legatee of him under the Will Exhibit A-2, he cannot be heard to say that there is an implied tenancy created by

1. (1965) 2 M.L.J. 188: (1965) 78 L.W. 281: I.L.R. (1966) 1 Mad. 177: A.I.R. 1965 Mad. 442.

his having acquired the status of a legatee. Only if there is such a status it would be an indicia to decide as to his statutory entitlement under the Act. It is in this respect, I characterised the contention as begging the question. Once it is established that the tenant and in this case the petitioner or the quondam tenant did take up the stand that the respondents are not the real owners of the property, then there is a denial of title. Once there is such a denial of title, any relationship of landlord and tenant automatically gets severed. This severance is caused because of the presumption which arises under section 111 (*g*) of the Transfer of Property Act, which forfeits the lease by reason of such denial of title. Forfeiture of lease, therefore (sic) does not buttress any such relationship of landlord and tenant even if it existed. Whilst not agreeing with the learned counsel for the petitioner that there is implied tenancy in the instant case, I hold that even if such an implied tenancy were there, he cannot take advantage of the statutory benefits under the Act, since he or the quondam tenant persisted in denying the title of the landlord and thereby caused the attraction of the principle contained in section 111 (*g*) of the Transfer of Property Act. The lower Court was, therefore, right in having denied the statutory entitlement to the petitioner on the ground that he denied the landlord's title and that Division Bench judgment compelled it to dismiss his application under section 9. I agree with the conclusion as I am obliged to follow the decision of the Division Bench also.

4. In view of the above, it is unnecessary to go into the other question whether as a legatee under the will, he could be construed as a tenant and if he could be so construed what are the other primordial requirements for gaining an entitlement under the beneficial provisions of the Act. Accepting the conclusion of the lower Court on the first contention, the civil revision petition fails and it is dismissed. No costs.

S.J. ——— *Petition dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ., G. Ramanujam and A. Varadarajan, JJ.*

Velayudham Junior Basic School, Srivilliputtur, through its Correspondent, and Manager V. Adaikalam

.. *Petitioner**

v.

The District Educational Officer, Virudhunagar

.. *Respondent.*

Madras Elementary Education Act (VIII of 1920), *sections* 41 *and* 42 *and Madras Elementary Education (Amendment) Act (II of* 1939), *section* 14, *Rules for the Grant of Recognition and Aid to Elementary Schools, Chapter I, Part II, rules* 13 (2) (ii) (*b*), 28 *and* 28-*A, Tamil Nadu Act XXIX of* 1974—*Junior Basic School—Recognised under Act. VIII of* 1920—*Services of teacher terminated by management—Reinstatement directed by Educational Authorities — Non-compliance of management — Notice to show cause issued against proposed action invoking rule* 28-*A. — Management's explanation not accepted — Order made withdrawing recognition — Validity challenged—Impact of the Amendment Act II of* 1939—*Disrict Educational Officer's power to withdraw recognition and aid—Rules held to be non-statutory — District Educational Officer's order only executive—Not liable to challenge under Article* 226 *of the Constitution — Nature of* certiorari *and Court's power to issue—Effect of Tamil Nadu Act XXIX of* 1974.

A Junior Basic School which had been granted recognition under the Madras Elementary Education Act of 1920 sought permission from the Deputy Inspector of Schools for the termination of the services of a teacher on the ground of wilful neglect of duty, gross insubordination and activities prejudicial to the institution. Permission was refused by the

*W. P. No. 2885 of 1972. *24th November,* 1978.

authority. Inspite of this, the correspondent of the school terminated the services of the teacher. On the representations made by the aggrieved teacher, the District Educational Officer set aside the order of termination and directed the reinstatement of the teacher. An appeal by the school to the Chief Educational Officer was unsuccessful. Thereafter, the District Educational Officer issued a show cause notice to the school under rule 28-A of the Rules relating to Grant of Recognition and Aid to Elementary Schools. The school gave an explanation. Notwithstanding this, a final order was made by the authorities by which recognition was withdrawn. Against this, the school filed a writ petition to the High Court under Article 226 of the Constitution.

The institution argued that the relationship between the teacher and the institution was that of an employer and employee; that the employment was purely contractual; that such a contract was not controlled or enlarged by the Rules relating to the recognition of Elementary Schools; hence the remedy of the discharged teacher, if any, was only to take action against the management for the alleged wrongful termination and that the Educational Authorities cannot impose the services of a teacher on them and direct her reinstatement on the erroneous view, that the termination of the teacher's service was not in accordance with the Rules governing grant-in-aid etc.

Held: The language employed by section 14 of Madras Act II of 1939 clearly indicates that all orders of recognition and orders admitting elmentary schools to aid under sections 41 and 42 in Chapter IV of Act VIII of 1920 (which has been omitted) shall be deemed to have been made by the Director of Public Instruction or such appropriate authority empowered in that behalf after Madras Act II of 1939 comes into force, to grant recognition to elementary schools or to admit elementary schools to aid. A legal fiction therefore comes into play and makes the quondam orders of recognition as if passed by the Director of Public Instruction who is the authority to grant such recognition or admit elementary schools to aid after Madras Act II of 1939 comes into force. By operation of a statutory fiction such orders would be deemed to have been made by the Director or by such other authority empowered by him after commencement of Madras Act II of 1939 to grant recognition to elementary schools or to admit elementary schools to aid. The order in the present case would therefore be an executive order made by the Rule-making authority under its non-statutory powers derivable from the Rules framed in Part II of the Rules relating to Elementary Schools, and in particular touching upon the grant of recognition and aid to such schools. It was common ground that after Madras Act II of 1939 had become law, such grant of recognition and aid to elementary schools could only be made under the Rules relating to elementary schools. It could not be said that the recognition accorded to the petitioner-institution originally under the provisions of Madras Act VIII of 1920 was continued statutorily by reason of section 14 of Madras Act II of 1939. On the other hand, by the operation of the legal fiction created under section 14 of Madras Act II of 1939, any recognition and grant-in-aid granted to the petitioner-institution should be deemed to have been so made or granted only under Part II of the Rules relating to Elementary Schools. [*Para.* 7.]

Following the decision in *Regina's case* (A.I.R. 1971 S.C. 1920), which held in unambiguous terms that the Rules in Part II of the Rules relating to Elementary Schools were non-statutory in character, it could not be said that the order of de-recognition, such as the one challenged in this case, sprang from the exercise of a statutory power purporting to be under section 14 of Act II of 1939.

[*Para.* 9.]

Under rule 28 of the Rules for the grant of recognition to elementary schools, recognition may be withdrawn if the salary of any teacher in the school is not being paid to him or her in accordance with the instructions set forth in the Service Register and under rule 28-A recognition may be withdrawn if any of the conditions of the recognition is violated. In the instant case the condition that for dispensation of service of a teacher prior approval of the Director of Public Instruction was necessary was not complied with. Again

under rule 13 (2) (ii) (*b*), the management of a school can terminate the services of a member of the staff after giving 3 months' notice or 3 months' salary, in case of wilful neglect of duty, serious misconduct, gross insubordination etc., provided that before issuing such notice etc., the Deputy Inspector of Schools had been consulted and approval obtained, which admittedly was not done in this case. Thus there was enough material on merits for withdrawal of recognition. [*Para.* 10.]

Though a writ of *certiorari* is a writ of right it is not a writ of course and generally is refused where there is an alternative remedy available by which the challenge can be otherwise agitated and adjudicated. The Court has sometimes a discretion also to refuse the Rule when there are no reasonable grounds for the issue of the same, and if it is satisfied that a writ ought not to issue in the peculiar circumstances of the case. In the instant case having regard to the attitude of the petitioner and its violation of Rules under which recognition had been granted, the Court cannot exercise the discretion for that reason also. [*Para.* 11.]

The petitioner would, however, be free to enforce its rights in a proper forum having regard to the later enactment, Tamil Nadu Act XXIX of 1974, which again brought to the anvil the process in and by which recognition is provided to private schools under the statute (*vide*, sections 11 to 13 of the Act). If the petitioner has any rights under this enactment, it is still open to him to agitate them under the correct forum. But as matters stand the Rule in *Regina's case* has to prevail and as such Rules are non-statutory in character a writ of *certiorari*, cannot be issued. [*Para.* 11.]

Cases referred to:—

Regina v. *St. A. H. E. School*, (1972) 1 S.C.J. 129: (1972) 1 M.L.J. (S.C.) 37: (1972) 1 An.W.R. (S.C.) 37: A.I.R. 1971 S.C. 1920; *Government of Madras* v. *Ramanujulu Chetty Elementary School*, (1973) 86 L.W. 440; *Sri Hindu Bala Patasala* v. *Director of Public Instruction*, (1967) 1 M.L.J. 138; *C. E. Fernandes* v. *Myria*, (1977) 4 S.C.C. 94: (1977) 2 S.C.J. 434: (1978) 1 S.C.R. 388: A.I.R. 1977 S.C. 2145; *State of Assam* v. *Ajit Kumar Sharma*, (1965) 1 S.C.R. 890: A.I.R. 1965 S.C. 1196.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings culminating in the order dated 3rd October, 1972 and made in Na. Ka. 109. C/70 on the file of the District Educational Officer, Virudhunagar, the respondent therein and quash the same.

A. R. Ramanathan and *Vedantham*, for Petitioner.

The Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—The Correspondent-Manager of Velayudham Junior Basic School, Srivilliputtur, seeks for the issue of a writ of *certiorari* or such other writ or direction calling for the records culminating in the challenged order, dated 3rd October, 1972 passed by the respondent and to quash the same and for other incidental directions. Though the petitioner-institution was founded in 1908, we have authentic information from the records that it was granted permanent recognition under the Madras Elementary Education Act (VIII of 1920), which held the field till Madras Act II of 1939 was passed. The school is a Junior Basic School catering to the needs of the pupils in Srivilliputtur, and is said to be popular. On account of wilful neglect of duty, gross insubordination and activities prejudicial to the institution, one of the teachers, R. Sakuntala Kanakasabai's services were sought to be dispensed with for which purpose permission was sought from the Deputy Inspector of Schools for such due termination of service. On refusal by the authority to accord such permission, the petitioner on 11th May, 1960 terminated her services by giving her three months' notice and the teacher was discharged from service after the expiry of the period. On representations made by the aggrieved teacher, the District Educational Officer, on 11th January, 1971, set aside the order of termination, and the

teacher was directed to be reinstated. A further appeal by the petitioner-institution to the Chief Educational Officer, Ramanathapuram, against the order of the District Educational Officer, was unsuccessful. The Chief Educational Officer, rejected the appeal of the petitioner-institution on 22nd June, 1971. Thereafter, the District Educational Officer, Virudhunagar, issued a show cause notice to the petitioner on 27th July, 1972 invoking rule 28-A of the Rules for the Grant of Recognition and Aid to Elementary Schools. The main ground on which recognition was proposed to be withdrawn was the failure of the institution to reinstate the discharged teacher in due compliance of the orders of the Educational Authorities. The institution gave an explanation, pleading that there was no ground for withdrawing the recognition, and also made it clear that it wanted to file a suit for a declaration that the termination of the service of the teacher was valid and legal. Notwithstanding this a final order was made by the authorities on 3rd October, 1972, wherein they reiterated their stand that under rules 28 and 28-A of Chapter I in Part II of the Rules relating to Elementary Schools, the order was justified. The institution was also informed that the Manager-Correspondent had dealt with the properties of the school for private purposes and that the institution having disobeyed the orders of the authorities and having violated the conditions of the grant, the order of de-recognition would stand. It is this order which is being questioned in this writ petition.

2. In the pleadings the case of the institution is that the relationship between the teacher and the institution was that of an employer and employee, that the employment was purely contractual and that such a contract was not controlled or enlarged by the Rules relating to the recognition of Elementary Schools. It was therefore stated that the remedy, if any, of the discharged teacher, was only to take action against the management for the alleged wrongful termination. In that context it is stated that the respondent cannot impose the services of a teacher on them and direct her reinstatement on the erroneous view that the termination of the teacher in question was not in accordance with the Rules governing grant-in-aid, etc. It is admitted that the Rules which have been alleged to have been violated in terminating the services of the teacher are non-statutory and that no enforceable or justiciable right can ever be claimed by the aggrieved teacher against the institution. Contemporaneously it is pleaded that such an action on the part of the management cannot be a ground for withdrawal of recognition of the institution, and that therefore, the challenged order is illegal and void. It is stated that in passing the order the principles of natural justice have been violated. The further plea is that the institution is not guilty of any default or failure to implement or obey the orders of the authorities. Having admitted that the institution has filed a civil suit, as already referred to, the plea is that there is no other statutory or other remedy to question the order, and that therefore, it became necessary for the petitioner to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

3. In the counter-affidavit filed by the Deputy Director of School Education, the position taken is that the charges levelled against the teacher, Selvi R. Sakuntala Kanakasabai, were not genuine, and that therefore, approval for the termination of the services of the said teacher was refused. The complaint is that the management arbitrarily dispensed with the services of the teacher and that therefore, the Educational Authorities had to interfere in appeal, as such dispensation of service was on inadequate and false grounds. According to the respondent the Department was satisfied that the discharge of the teacher was not for the reasons contemplated in rule 13 (2) (ii) (*b*) of the Rules. The further complaint is that before the issue of the notice of termination of the services of the teacher, the procedure prescribed in rule 13 (2) (ii) (*b*), which enjoins consultation with and approval by the Deputy Inspector of Schools, was not followed and that the appellate order made by the District Educational Officer to reinstate the teacher was not respected by the management. In this context it is stated that the conduct of the institution resulted in violation of the conditions for the recognition and aid and that therefore withdrawal was proposed, and in order to satisfy the provisions

of the Rules, a show-cause notice was issued and ultimately the challenged order was passed. The defence is that the reinstatement of the teacher was ordered in strict conformity with the Rules governing the administration of aided schools and that, as the termination was on inadequate grounds and also in the teeth of the Rules under which the grant was made, the teacher was directed to be reinstated. As the prior approval of the Deputy Inspector of Schools was not obtained, the order challenged has been validly made. The Rules relating to elementary schools are Rules made for the administration of aided institutions constituted by the Government and recognition and aid are granted under the Rules and likewise withdrawal of recognition and aid is also taken up with reference to the same Rules. As such withdrawal is based on the Rules framed and as rule 28-A which provides for such withdrawal if any of the conditions of recognition is violated by an aided institution, and as the Correspondent failed to carry out the orders of the Department, there has been an open violation of the conditions of recognition and in that sense also the order cannot be challenged.'

4. This writ petition originally came up before Koshal, J. The learned Judge made the following order:—

"In *Regina* v. *St. A. H. E. School*[1], it was held that Part II of the Rules relating to Elementary Schools, which regulate the grant of recognition and aid to such schools, were non-statutory in character, that the enforcement nthereof was a matter between the Government and the management of elementary schools and that a third party, such as a teacher aggrieved by some order of the management would not derive from the Rules any right enforceable against the management on the ground of a breach of or non-compliance with any of those Rules. Relying on this verdict, Ramaprasada Rao, J., decided a writ petition on the 9th October, 1971, holding that the said Rules being non-statutory in character, they could not be enforced even by the management of a school against whom an order by the Educational Authorities was passed in breach thereof.

In *Illathar Valibar Sangham Higher Elementary School, Tuticorin represented by its Manager and Correspondent L. S. Arunachalam* v. *The Government of Tamil Nadu and others*[1], decided by me on the 5th of August, 1976, the dictum of their Lordships of the Supreme Court in *Regina's case*[2] as also the judgment of Ramaprasada Rao, J., were brought to my notice and following the same, I held that no remedy by way of enforcement of the said Rules was available to a school under Article 226 of the Constitution of India for the reason that the Rules were non-statutory in character. However, learned counsel for the petitioner has drawn my attention to a Bench decision of this Court reported in *Government of Madras* v. *Ramanujulu Chetty Elementary School*[3], wherein Veeraswami, CJ. and Raghavan, J., held that, by reason of the provisions of section 14 of Madras Act II of 1939, a school which was enjoying recognition earlier would continue to enjoy the same on a statutory basis and that such a recognition could not be withdrawn by an administrative decision (such as can be taken under the Rules abovementioned). It is contended on behalf of the District Educational Officer that this Bench decision runs counter to the dictum of their Lordships of the Supreme Court above referred to. As it is, I am of the opinion that it is a matter of considerable importance and merits consideration at the hands of a Full Bench of this Court. I, therefore, direct that the records be laid before my Lord the Chief Justice with a request that a Full Bench may be constituted to decide this case".

5. The Order of Reference says that there is a conflict between the ratio of the Supreme Court in *Regina* v. *St. A. H. E. School*[2], and the Bench decision of this Court in

1. (1972) 1 S.C.J. 12: (1972) 1 M.L.J. (S.C.) 37: (1972) 1 An.W.R. (S.C.) 37: A.I.R. 1971 S.C. 1920.

1. W.P. No. 6599 of 1973.
2. (1972) 1 S.C.J. 129: A.I.R. 1971 S.C. 1920.
3. (1973) 86 L.W. 440.

Government of Madras v. *Ramanujulu Chetty Elementary School*[1]. It is in these circumstances that this petition has been placed before us for a final decision on the question.

6. The Division Bench of this Court in the decision referred to above held that, after the passing of Madras Act II of 1939, the Rules relating to Elementary Schools, including the Rules for the grant of recognition and aid to elementary schools in Part II therein, in so far as they applied to recognition and aid given before 1939, were statutory and that therefore, a writ could issue, and that any order by the authorities passed in the discharge of their functions, while administering such Rules could not be sustained, if they were contrary to the provisions of the Act. We are not inclined, in this case, to set out the history of the development of elementary education in the State. In fact, it has been referred to in detail in the judgment of Kailasam, J., in *Sri Hindu Bala Patasala* v. *Director of Public Instruction*[2]. We shall, however, refer to the salient provisions of the Act which are necessary for our purpose. When Madras Act II of 1939, the Madras Elementary Education (Amendment) Act, 1939, was passed, it purported to serve certain purposes specifically dealt with therein. Section 14 of Act II of 1939, reads as follows:—

"All orders of recognition in respect of elementary schools and all orders admitting elementary schools to aid, made or deemed to have been made by a District Educational Council before the commencement of this Act under sections 41 and 42 of the said Act respectively, shall be deemed to have been made by the Director of Public Instruction or by such authority as may be empowered by him after this Act comes into force to grant recognition to elementary schools or to admit elementary schools to aid, as the case may be, and any such order shall be liable to cancellation or modification as if it had been made after the commencement of this Act".

1. (1973) 86 L.W. 440.
2. (1967) 2 M.L.J. 138.

7. Chapter IV of the Madras Elementary Education Act, VIII of 1920, dealt with the recognition of Elementary Schools and grant-in-aid to such schools. Section 41 empowered the District Educational Council to grant such recognition, with or without conditions, and, in a like manner, to cancel or suspend any order granting such recognition. An appeal was provided to the Director of Public Instruction in regard to such an order. A *suo motu* power was also vested in the Director of Public Instruction to modify or cancel any order of recognition or interfere with any such order granting recognition or cancelling recognition or suspending any order granting recognition. Section 41 (5) made it clear that all orders of recognition in respect of Elementary Schools made by the Director of Public Instruction or by an Inspector of Schools, before this Act came into force, shall be held to have been made under that section. Section 42 enabled the management of an Elementary School to seek for grant-in-aid and such an application for aid shall also be dealt with in the same fashion as any application for recognition. The amended provisions referred to above made all orders of recognition in respect of elementary schools and all orders admitting elementary schools to aid made or deemed to have been made by the District Educational Council before the commencement of Madras Act, II of 1939, and under sections 41 and 42 of Madras Act VIII of 1920, as if they have been made by the Director of Public Instruction or by such authority as may be empowered by him after Madras Act II of 1939 came into force, granting recognition to elementary schools or admitting Elementary Schools to aid, as the case may be, and any such order shall be liable to cancellation or modification, as if it had been made after the commencement of Madras Act II of 1939. The primary question argued before us is whether under section 14 of Madras Act II of 1939, any order of recognition or de-recognition or any order admitting Elementary Schools to aid or withdrawing such aid, and made after the passing of Madras Act II of 1939, would be an order passed under the provisions of Madras Act VIII of 1920, or whether it would be an order passed by the appropriate authority after the commencement of Madras

Act II of 1939. It is on the interpretation of this part of section 14 of Madras Act II of 1939 that the entire argument of counsel rests. The Division Bench of this Court in *Government of Madras v. Ramanujulu Chetty Elementary School*[1], while agreeing with Kailasam, J., observed:

"It may be seen that recognition accorded to the respondents originally under the provisions of the Act was continued statutorily by reason of section 14 of Madras Act II of 1939. That amounts to a statutory sanction of the continued recognition".

On the plain language of section 14 of the Act, we are not able to agree with this interpretation. It would not have been difficult for the Legislature to have made in the amending Act itself provisions similar to sections 41 and 42 of Madras Act VIII of 1920. On the other hand, it is seen that Chapter IV dealing with recognition and grant-in-aid to elementary schools has been omitted by section 5 of Madras Act II of 1939. Such a precision, specificity and definiteness in the language of the amended Act should be borne in mind while interpreting section 14 of Madras Act II of 1939. The language employed in section 14 of Madras Act II of 1939 clearly indicates that all orders of recognition and orders admitting elementary schools to aid, under sections 41 and 42 appearing in Chapter IV (of Act VIII of 1920) which has been omitted, shall be deemed to have been made by the Director of Public Instruction or such appropriate authority empowered in that behalf, after Madras Act II of 1939 comes into force, to grant recognition to elementary schools or to admit elementary schools to aid. A legal fiction, therefore, comes into play and makes the quondam orders of recognition, as if passed by the Director of Public Instruction, who is the authority to grant such recognition or admit elementary schools to aid, after Madras Act II of 1939 comes into force. It is at this stage that the Rules relating to elementary schools framed under the Madras Elementary Education Act, 1920, loom large. These Rules were admittedly Rules made by the Executive to carry out all or any of the purposes of the Act. They were framed under section 56 of the Patent Act. After the commencement of Madras Act II of 1939 the District Educational Officer is the person who has been apparently authorised by the Director of Public Instruction in that behalf, to pass an order of recognition or admit an elementary school to aid. The Division Bench of this Court took the view that all quandom orders passed by the District Educational Council under sections 41 and 42 of the Parent Act shall be deemed to have been made under Act II of 1939, and hence they would be orders made under the provisions of a statute. With the utmost respect to the learned Judges, we are unable to agree, as section 14 makes it clear that by operation of a statutory fiction such orders shall be deemed to have been made by the Director of Public Instruction or by such other authority empowered by him, after the commencement of Madras Act II of 1939, to grant recognition to elementary schools or to admit elementary schools to aid. In our view therefore, this would be an executive order made by the rule-making authority under its non-statutory powers, derivable from the Rules framed in Part II of the Rules relating to Elementary Schools, and in particular touching upon the grant of recognition and aid to such schools. It is common ground that after Madras Act II of 1939 has become law, such grant of recognition and aid to elementary schools could only be made under the Rules relating to elementary schools. In our opinion, therefore, it cannot be said that the recognition accorded to the petitioner-institution originally under the provisions of Madras Act VIII of 1920 was continued statutorily by reason of section 14 of Madras Act II of 1939. On the other hand, by the operation of the legal fiction created under section 14 of Madras Act II of 1939, any recognition and grant-in-aid granted to the petitioner-institution should be deemed to have been so made or granted only under Part II of the Rules relating to Elementary Schools.

8. Having reached this position, it is obvious, as per the decision of the Supreme Court in *Regina v. St. A. H. E. School*[1],

1. (1973) 86 L.W. 440.

1. (1972) 1 S.C.J. 129: A.I.R. 1971 S.C. 1920.

that the enforcement of such Rules is a matter as between the Government and the management and that such Rules being non-statutory in character, could not be enforced even by the management of any school against whom an order by the Educational Authorities has been passed alleging breach thereof. Learned counsel for the petitioner before us very fairly concedes that the Rules made in Part II of the Rules relating to elementary schools are non-statutory in character and that any order passed thereunder either in the matter of recognition or in the matter of grant-in-aid is pursuant to the non-statutory Rules. It is fundamental that whatever may be the remedy the petitioner may have in common law against the respondent or the State, as the case may be, in such circumstances, it cannot seek the aid of Article 226 of the Constitution. We are reinforced in our view by another decision of the Supreme Court in *C. E. Fernandes* v. *Myria*[1], which reiterated their earlier opinion in *State of Assam* v. *Ajit Kumar Sharma*[2]. The Supreme Court observed:

> "Where such conditions of grant-in-aid are laid down by mere executive instructions, it is open to a private college to accept those instructions or not to accept them. If it decides not to accept the instructions, it will naturally not get the grant-in-aid which is contingent on its accepting the conditions contained in the instructions. On the other hand, if the college accepts the conditions contained in the instructions, it receives the grant-in aid. If, however, having accepted the instructions, containing the conditions and terms, the college does not carry out the instructions, the Government will naturally have the right to withhold the grant-in-aid. That is, however, a matter between the Government and the private college concerned. Such conditions and instructions as to grant-in-aid confer no right on the teachers of the private colleges and they cannot ask that either a particular instruction or condition should be enforced or should not be enforced".

1. (1977) 2 S.C.J. 434 : (1977) 4 S.C.C. 94: (1978) 1 S.C.R. 388 : A.I.R. 1977 S.C. 2145.
2. (1965) 1 S.C.R. 890: A.I.R. 1665 S.C. 1196.

9. The position therefore, is that, following the decision in *Regina's case*[1], which held in unambiguous terms that the Rules in Part II of the Rules relating to Elementary Schools are non-statutory in character, it cannot be said that the order of de-recognition, such as the one challenged in this case, springs from the exercise of a statutory power purporting to be under section 14 of Act II of 1939.

10. On merits also it is clear that under Part II of the Rules relating to Elementary Schools the authority has the power to cancel a quandom grant. In the show cause notice issued by the respondent, rules 28 and 28-A of the Rules for the grant of Recognition and Aid to Elementary Schools have been invoked. This is a case in which the appropriate authority did not agree with the management in the matter of the termination of the services of the teacher. On and from the date when the challenged order was made the petitioner-management did not pay any salary to the concerned teacher. Rule 28 contemplates that recognition may be withdrawn if the salary of any teacher in the school is not being paid to him or her in accordance with the instructions set forth in the service register. Rule 28-A says that the recognition may be withdrawn if any of the conditions of the recognition are violated. It is also seen from rule 13 (2) (*ii*) (*b*) of the Rules that the management of a school shall have the power to terminate the services of any member of the staff after having given three months' notice or three months' salary in lieu thereof for wilful neglect of duty, serious misconduct, gross insubordination, etc., provided that in such cases, before the issue of the notice, the Deputy Inspector of Schools is consulted and his approval obtained by the management about the propriety of such action. It is common ground that no such aproval was obtained. There is enough material on record to show that under the Rules recognition could be withdrawn, because one of the conditions of recognition namely, that in the case of dispensation of service of a teacher the prior approval of the Deputy Inspector of

1. (1972) 1 S.C.J. 129 : A.I.R. 1971 S.C. 1920.

Schools should be obtained, was not complied with.

11. Even on merits there appears to be no case available to the petitioner to challenge the order. We are, however, not expatiating on this, since the petitioner is free to enforce its rights in a proper forum, having regard to the later enactment, Tamil Nadu Act XXIX of 1974, which again brought to the anvil the process in and by which recognition is provided to private schools under the statute. (*Vide*: Sections 11, 12 and 13 of Tamil Nadu Act XXIX of 1974). If the petitioner has any right under the new enactment of 1974, it is still open to it to agitate them in the correct forum. But as matters stand, and as in our view, the rule in *Regina's case*[1], has to prevail, and as such Rules are non-statutory in character, we are unable to issue a writ of *certiorari* under Article 226 of the Constitution. Though a writ of *certiorari* is a *writ of right*, it is not a *writ of course*, and generally is refused where there is an alternative remedy available by which the challenge can be otherwise agitated and adjudicated. The Court has sometimes a discretion also to refuse the rule when there are no reasonable grounds for the issue of the same, and if it is satisfied that a writ ought not to issue in the peculiar circumstances of the case. In the instant case, we are not satisfied that such a *writ of course* ought to issue since it is a *writ of right*. Having regard to the attitude of the petitioner, who has violated the Rules under which the recognition had been granted, we are unable to exercise the discretion, for that reason also.

12. In the result, the writ petition fails and is dismissed. There will be no order as to costs.

S.J. ——— *Petition dismissed.*

1. (1972) 1 S.C.J. 129: (1972) 1 M.L.J. (S.C.) 37: (1972) 1 An.W.R. (S.C.) 37: A.I.R. 1971 S.C. 1920.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

S. V. A. Karuppanna Thevar, Jayalakshmi Vilas Transport, Salem

.. *Petitioner**

v.

The Regional Transport Officer, Erode ..

.. *Respondent.*

Tamil Nadu Motor Vehicles Taxation Act (I of 1974), sections 7, 15 — Tamil Nadu Motor Vehicles Taxation Rules, rule 8—Penalty for default in payment of tax—Transferee of vehicle not liable for penalty for default of the transferor.

On a consideration of the relevant provisions of the Tamil Nadu Motor Vehicles Taxation Act of 1974 and the Tamil Nadu Motor Vehicles Taxation Rules, it is apparent that the Legislature worked to make a clear distinction between the incidence of tax and the incidence of penalty, in that the incidence of tax was attracted to the vehicle whereas the incidence of penalty was directed on the person committing default in payment of tax. Accordingly, even a transferee of the vehicle has been made liable to pay, under section 7, the arrears of tax due and payable on the vehicle before the ownership was transferred, whereas the penalty payable for late payment or non-payment of tax was to be borne by the person committing the default which, in the case of a transfer of a vehicle would mean the original owner, lest the original owner should evade his liability to pay penalty on the ground he was not having possession or control of the vehicle. Section 15 as well as rule 8 have provided that the incidence of penalty cannot be avoided merely because, the registered owner has put the vehicle in the possession or control of some other party while retaining the ownership in himself. In that state of affairs, the petitioner's contention that as a transferee he was not liable to pay the penalty imposed on the original owner has to be sustained.

[*Para.* 10.]

* W.P. No. 2826 of 1976.

24th November, 1978.

Petition under Article 226 of the Constitution praying the High Court to issue a *writ* of *certiorari* calling for records in Memo. R.D. 27742/B-1/76, dated 6th July, 1976 and quash the same.

K. Thirumalai and *G. R. Krishnamurthi*, for Petitioner.

C. Chinnaswami, for Government Pleader, for Respondent.

The Court made the following

ORDER.—The petitioner impugns the order of the respondent in Memo. No. R. 27742/B-1/76, dated 6th July, 1976 demanding a sum of Rs. 22,484 towards payment of tax and penalty for his stage carriage bearing registration No. MDB 2250 and plying on the route Coimbatore to Karaidibavi *via* Singanallur, Ondiputhur, Chinthamanipudur, Sulur, Sulur Aerodrome and Paruvai. He therefore prays for the issue for a writ of *certiorari*, or any other writ or direction to quash the impugned order.

2. The stage carriage MDB 2250, was originally owned by one S. S. Venkatrama Thevar. During the quarter 1st April, 1974 to 30th June, 1974, he plied the bus till 23rd April, 1974 and thereafter stopped the vehicle. As per Rules he should have paid the quarterly tax for the vehicle on or before 18th April, 1974 but, he failed to remit the tax. By notice dated 23rd April, 1974 and 14th May, 1974, he was called upon to pay the full tax for the quarter and as against these demands, he filed Writ Petition No. 1972 of 1974, and that petition was disposed of following the Judgment in W.P. No. 774, etc. of 1974, dated 204th September, 1974.

3. After the filing of the writ petition the said Venkatarama Thevar applied for transfer of the bus in favour of the petitioner and the transfer was allowed on 7th March, 1975, granting time for four months for submission of record. As the permit was due to expire on 16th August, 1974, Venkatarama Thevar applied for renewal on 15th April, 1974, submitting only the part A permit of the vehicle. He reported that the registration certificate of the vehicle was lost and he prayed for the issue of a duplicate certificate. In view of the transfer of the permit in his favour the petitioner applied for the issue of a duplicate registration certificate to him, but as the duplicate certificate was not issued, he filed W.P. No. 5363 of 1975, for a *mandamus* being issued to the Regional Transport Officer to issue the certificate. In the meanwhile, the Regional Transport Authority refused renewal of the permit on the ground that records had not been produced. As against that order the petitioner filed W.P. No. 7332 of 1975, W.P. No. 5363 of 1975 and 7332 of 1975 were heard together and this Court allowed both the petitions. Pursuant to the orders of this Court, the petitioner obtained a duplicate registration certificate as well as an order of transfer of the permit in his favour and he began to ply the bus from 26th June, 1976. Till then, *i.e.*, from 26th April, 1974, onwards, the bus had been stopped from service and stoppage report had been submitted to the respondent for the period in question.

4. Though the petitioner began to ply the bus from 26th June, 1976 onwards after paying the tax due for June, 1976 he was informed by the Motor Vehicles Inspector that unless he paid the tax arrears and penalty amounting to Rs. 22,484 for the quarter ended 30th June, 1974 the tax endorsement for the quarter ended 30th September, 1976 would not be effected. Soon after, the petitioner received the impugned notice informing him that if the sum of Rs. 22,484 was not remitted within 15 days time, action would be taken under the Revenue Recovery Act, to collect the amount. It is in that situation the petitioner has rushed to this Court for the issue of a writ of *certiorari*.

5. The petitioner submits that since the bus did not ply on the route after 26th April, 1974 the demand of tax for the entire quarter ended 30th June, 1974, together with penalty is not legal in view of the judgment of this Court in W.P. No. 777, etc. of 1974, He then says that subsequent to the disposal of the W.P. No. 1972 of 1974 filed by Venkatarama Thevar a fresh demand should have been made on him for payment of the tax and in the absence of such notice, he, (the petitioner) should have been issued a show cause notice before the demand was made on him. The petitioner also questions the propriety and legality of the demand for pay-

ment of penalty in addition to respondent's payment of tax for the quarter in question.

6. In the counter-affidavit filed on behalf of the respondent, it is stated that since the bus had plied on the route till 25th April, 1974, the permit holder, *viz.*, Venkatarama Thevar, should have paid the full tax for the quarter within that time, the respondent is entitled to demand payment of tax for the full quarter together with penalty at 200 per cent. The judgment in W.P. No. 777 etc., of 1974 does not affect the validity of the demand because of the bus plying on the route till 25th April, 1974 and because of non-remittance of tax within the time allowed by law and failure to send stoppage report in time. The transfer of the bus in favour of the petitioner was allowed subject to the condition the petitioner should pay all arrears of tax due in respect of the vehicle and the petitioner had also given an undertaking to that effect. Having regard to those features, it is not open to the petitioner to question the validity of the demand relating to tax and penalty for the quarter ended 30th June, 1974. Inasmuch as demand notice had already been served on Venkatarama Thevar, there was no need to issue a fresh notice to him after the disposal of his petition, *viz.*, W.P. No. 1972 of 1974, and as far as the petitioner is concerned, no show cause notice was called for in view of his undertaking to pay the tax arrears due on the vehicle. The respondent has further stated that though the bus had plied only upto 25th April, 1974, the petitioner has to pay tax for the full quarter because, as per the Act and the Rules, if the bus had plied even for a limited period during the quarter, the permit-holder has to remit tax for the entire quarter within the prescribed time and thereafter apply for refund of tax in accordance with the Rules for the period for which the bus did not ply. There is no provision in the Act and the Rules to collect tax for the month of April alone on account of the bus having plied only for a certain number of days in that month.

7. Mr. Thirumalai, learned counsel for the petitioner, advanced two principal contentions to assail the impugned order. The first is that inasmuch as the vehicle had plied only for 25 days in April, 1974, and had not plied thereafter till resumption of service on 26th June, 1976 the respondent is entitled to ask for payment of tax only for the month of April, 1974 and not for the months of May and June, 1974. Secondly, the petitioner cannot be called upon to pay penalty for non-payment of tax by Venkatarama Thevar for the quarter ended 30th June, 1974.

8. To appreciate the arguments of Mr. Thirumalai, it is necessary to refer to some of the provisions of the Tamil Nadu Motor Vehicles Taxation Act, 1974 (hereinafter referred to as the Act) and the Tamil Nadu Motor Vehicles Taxation Rules (hereinafter refered to as the Rules). section 2 (7) of the Act defines a 'registered owner' as a person in whose name a motor vehicle is registered or deemed to be registered under the Motor Vehicles Act. Section 2 (8) defines 'tax' as tax leviable under the Motor Vehicles Act. Section 3 (1) lays down that subject to the provisions of sub-section (2) tax shall be levied on every motor vehicle kept or used in the State of Tamil Nadu at the rates specified for such vehicle in the Schedule. Section 4 lays down that the tax levied under the Motor Vehicles Act shall be paid in the manner prescribed, by the registered owner or by any other person having possession or control of the motor vehicle. Section 5 deals with liability to payment of tax by persons succeeding to ownership or having possesion or control of motor vehicles. As this is an important section to be noted, it is extracted in full:—

> "*Section 7*:—If the tax leviable in respect of any motor vehicle remains unpaid by any person liable for payment thereof and such person, before paying the tax, has transferred the ownership of such vehicle or has ceased to be in possession or control of such vehicle, the person to whom the ownership of the vehicle has been transferred or the person who is in possession or control of such vehicles, shall be liable to pay the said tax:
>
> Provided that nothing contained in this section shall be deemed to affect the liability to pay the said tax of the person who has transferred the ownership or has ceased to be in possession or control of such vehicle".

Section 8 deals with the period within which the tax has to be paid. Section 18 deals with penalty for failure to pay tax and that section also needs extraction in full:

> "*Section* 15: If the tax due in respect of any motor vehicle has not been paid within the period prescribed under section 8, the registered owner or the person having possession or control thereof shall:
>
> (*a*) pay, in addition to the tax, a penalty of such sum, not exceeding twice the amount of the quaterly tax payable, as may be prescribed, and different sums may be prescribed for different classes of motor vehicles and for different periods; and
>
> (*b*) also be punishable with fine which may extend to Rs. 50 and the amount of the tax due by him in respect of such vehicle for the quarter or quarters concerned together with the penalty referred to in clause (*a*) shall also be recovered as if such tax and penalty were a fine".

The penultimate section that needs reference is, section 16, which provides for recovery of tax or penalty as arrears of land revenue. Lastly, I may advert to section 18 which states that if the due in respect of a motor vehicle is not paid within the prescribed period, the validity of the permit shall become ineffective from the date of expiry of the said period until such time the tax is actually paid. Section 24 gives power to Government to make Rules for carrying out the purposes of the Act. Turning to the Rules, rule 8 prescribes the penalty for non-payment of tax within the time prescribed. As per clause (4) of the Rule, if the tax is paid beyond 45 days and outside the quarter for which the tax is due, then penalty at twice the quarterly tax with surcharge has to be paid. Rule 11 deals with refund of tax.

9. Having referred to some of the salient provisions in the Act and the Rules regarding the liability to pay tax and penalty, let us consider the second contention of the petitioner that he cannot be called upon to pay penalty for the default committed by the original permit-holder in payment of tax. So far as the liability to payment of tax is concerned, section 7 clearly lays down that if the tax leviable in respect of any motor vehicles remains unpaid by the person liable to pay the tax and such person has, before paying the tax, transferred the ownership of the vehicle to another person or has ceased to be in possession or control of such vehicle, then the person to whom the ownership of the vehicle had been transferred or the person who is in possession or control of the vehicle shall be liable to pay the said tax. The proviso to the section says that notwithstanding the liability of the transferee of the vehicle or the person having possession or control of the vehicle to pay the tax, the liability of the original owner of the vehicle will continue to subsist, which means that the authorities can successfully call upon the original owner also to pay the tax. On the other hand, section 15 which deals with penalty for failure to pay the tax makes reference only to the registered owner or the person having possession or control of the vehicle, and there is no reference whatever to the transferee of the ownership of the vehicle. On account of the significant difference in the wording of the two sections, the petitioner is justified in contending that as a transferee of the ownership of the vehicle, he can be called upon to pay only the arrears of tax and not the penalty realisable under the Act for non-payment of the tax in time. The learned Government Pleader, would, however, contend that arrears of tax must be deemed to include penalty as well and as such, the petitioner, as a transferee of the ownership of the vehicle, is also bound to pay the penalty besides the arrears of tax. I find no support for this argument in the provisions of the tax. 'Tax' has been defined under section 2 (8) as tax leviable under the Act. It is not stated that tax shall mean and include penalty also. Likewise, sections 3 and 4 which deal with levy of tax and payment of tax do not also provide for penalty being included within the meaning of the word 'tax'. If it was the intention of the Legislature that a transferee of the vehicle should pay not only tax arrears payable by the transferor, but also penalty for late payment of tax, it would have clearly provided for it in section 15. On the other hand, what section 15 lays down is that the registered owner or the person having possession or control of the vehicle should pay the

prescribed penalty for non-payment of tax in time. The words 'person having possession or control of the vehicle' cannot be taken to include a transferee of the ownership of the vehicle, because section 7 has categorised a transferee of the ownership of the vehicle as a different person from one who is in possession or control of the vehicle. In the case of a transfer, the possession and control of the vehicle will pass on to the transferee in his capacity as owner, but in the case of a person merely having possession or control of the vehicle, the ownership will continue to be with the original owner and only the possession or management of the vehicle will pass on to the agent. There is, therefore, no scope for contending that the words 'person having possession or control thereof' occurring in section 15 should be taken to include a transferee of the ownership of the vehicle.

10. The learned Government Pleader then argued that under section 16 of the Act any tax or penalty due under the Act may be recovered as an arrear of land revenue and since this provision does not make any difference between arrears of tax and penalty a transferee must also be held bound to pay the penalty. I am not impressed with this argument because the section is general in its terms and will cover recovery of tax or penalty when the vehicle is in the hands of the original owner as well as his agent. Possibly, it may also apply to those cases where a transferee of the vehicle has to pay arrears of tax. Such being the case, it cannot be accepted that section 16 has not made any difference between recovery of tax as well as recovery of penalty and from that must be construed that penalty can be recovered not only from the original owner, but also from the transferee. As a matter of fact, the latter portion of section 16 militates against the acceptance of the Government Pleader's contention. In this portion it is stated that for the purposes of collecting tax or penalty, the motor vehicle in question or its accessories may be distrained and sold whether or not the vehicle or the accessories are in the possession or control of the person liable to pay the tax or such penalty. There is no reference to the ownership of the vehicle, but only to the possession or control of the vehicle. This would naturally mean that the vehicle or its accessories can be distrained, if they are in the possession of the original owner or even if they are in the possession and control of some other party on his behalf. These words will not apply to a person having possession or control of the vehicle as a lawful transferee of the ownership from the original owner. Rule 8 of the Rules also refers to the registered owner or the person having possession or control of the vehicle being liable to pay penalty at the rates mentioned therein. There is no reference whatever to a transferee of the vehicle also being liable to pay penalty is accordance with the rates given in the Rule. Therefore, on a consideration of the relevant provisions of the Act and the Rules, I am of opinion that the Legislature wanted to make a clear distinction between the incidence of tax and the incidence of penalty, in that the incidence of tax was attached to the vehicle whereas the incidence of penalty was directed on the person committing default in payment of tax. Accordingly, even a transferee of the vehicle has been made liable to pay, under section 7, the arrears of tax due and payable on the vehicle before the ownership was transferred, whereas the penalty payable for late payment or non-payment of tax was to be borne by the person committing the default which, in the case of a transfer of a vehicle would mean the original owner. Lest the original owner should evade his liability to pay penalty on the ground he was not having possession or control of the vehicle, section 15 as well as rule 8 has provided that the incidence of penalty cannot be avoided merely because the registered owner has put the vehicle in the possession or control of some other party while retaining the ownership in himself. In that state of affairs, I have to sustain the petitioner's contention that as a transferee he is not liable to pay the penalty imposed on the original owner.

11. Now, taking up the first contention of the petitioner, that since the bus did not ply on the route from 26th April, 1974, the respondent is not justified in demanding tax for all the three months of the quarter, 1st April, 1974 to 30th June, 1974, the admitted facts are that the bus did not ply after 25th

April, 1974. As such, if Venkatarama Thevar had paid the tax within the stipulated time, he could have applied for and got refund of tax for the months of May and June, 1974. Because he had failed to remit the tax in time and apply for refund for the two months during which the bus did not ply, the petitioner cannot be made to suffer. We have to bear in mind the circumstances under which the petitioner had the vehicle transferred to his name. The registration certificate was not available and the petitioner had to seek the intervention of this Court to get a duplicate certificate. Likewise, he had also to get a writ of *mandamus* to have the vehicle transferred to his name. In these circumstances, the petitioner could not have known that tax had not been paid for the quarter in question and Venkatarama Thevar had not applied for refund of tax for the two months when the bus did not ply. On account of these factors there is force in the contention of the petitioner that he can be called upon to pay tax only for the month of April, 1974. No doubt, he had given an undertaking at the time of getting the transfer that he will pay arrears of tax due and payable on the vehicle. But the undertaking cannot mean that the petitioner had agreed to pay tax arrears irrespective of the question whether he was liable to pay them or not. The undertaking can be confined only to such portion of the tax as the petitioner is legally bound to pay. Bearing in mind the facts of the petitioner's case the words 'tax leviable in respect of any motor vehicle remaining unpaid' occurring in section 7 must be held referable only to tax for the month of April, 1974, and not to the subsequent two months when the bus did not ply. In that view of the matter, the petitioner's liability to pay tax arises only for the month of April, 1974. This view of mine is in accordance with Mohan, J., in *Paramakkudi Bus Transports Pvt., Ltd. v. District Transport Officer, Ramanathapuram*[1], where the learned Judge has held that when the bus in question did not ply beyond 26th January, 1975, the authorities cannot insist upon payment of tax for the months of February and March, 1975.

1. W.P. No. 2021 of 1976.

12. For the reasons abovesaid, the writ petition will stand allowed and the rule *nisi* will be made absolute, subject to the condition that the petitioner pays the tax due on the vehicle for the month of April, 1974. The petitioner is given four weeks' time from today to pay the said tax, if the same has not already been paid. The petitioner will be entitled to his costs in this petition. Counsel's fee is fixed at Rs. 150.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

The Cheran Transport Corporation Ltd. .. *Petitioner**

v.

The Additional Commissioner for Workmen's Compensation, Coilbatore and another .. *Respondents.*

Motor Transport Workers Act (XXVII of 1961), *section* 2 (3) (h)*—Madras Shops and Establishments Act (XXXVI of* 1947), *section* 41 (2)*—Conductor in a transport undertaking—Dismissal from service after enquiry—Appeal by conductor to the Additional Commissioner for Workmen's Compensation under section* 41 (2) *of the Madras Shops and Establishments Act—Appeal held not competent—Writ of* certiorari *issued.*

The second respondent was employed as a conductor in the transport undertaking of Cheran Transport Corporation Limited, petitioner herein. Certain charges of misconduct were framed against the second respondent and after enquiry, the petitioner found him guilty of the charges and dismissed him from service. Thereupon the conductor preferred an appeal to the first respondent, the Additional Commissioner for Workmen's Compensation under section 41 (2) of the Madras Shops and Establishments Act. In spite of the objections of the petitioner, the first respondent held that there was no repugnancy between the Motor Transport Workers Act,

*W.P. No. 5190 of 1976 16th November, 1978.

1961 and the Madras Shops and Establishments Act, 1947 and that the second respondent was entitled to prefer an appeal under the State Act. Thereupon the petitioner preferred first writ petition.

Held: The definition of a motor transport worker, in section 2 (3) (*h*) of the Motor Transport Workers Act, 1961, is of a two-fold character. In the earlier portion it is an inclusive definition, but in the later portion it is exclusive in character. The exclusive portion of the definition says that except in section 8 which deals with canteens, any employee in a factory as defined in the Factories Act, and any person to whom any law for regulating conditions of service of employees in shops or commercial establishments will not be a motor transport worker. In view of this categoric exclusion by Parliament, it has to be taken that a motor transport worker cannot invoke to his aid provisions contained in the State Act, the Madras Shops and Establishments Act, 1947. The Central Act has to be taken as an exclusive and comprehensive enactment in so far as the motor transport workers are concerned. [*Para.* 6.]

There is no scope at all for a comparative study of the two Acts because they are on different planes and operate in different fields. The Central Act has been enacted solely and exclusively to deal with the case of motor transport workers, whereas the State Act is general and would apply to all classes of persons employed in shops, commercial establishments, restaurants, theatres and other establishments. The special must be held to exclude the general, that the Central Act excludes the applicability of the State Act to motor transport workers. Having regard to the expressions used in the Central Act, it must be treated as an exhaustive and exclusive enactment, and once that conclusion is reached there is no scope at all for the provisions of the Act to be compared with the provisions of the State Act to find out whether there is any repugnancy in the terms of the two enactments. [*Para.* 6.]

The second respondent was not entitled to invoke section 41 (2) of the Madras Shops and Establishments Act and file an appeal to the first respondent against the order of dismissal. [*Para.* 7.]

Cases referred to:—

A. B. Transport v. *Ramakrishna*, A.I.R. 1967 Kerala 225; *Amarnath* v. *Presiding Officer, Industrial Tribunal*, A.I.R. 1970 Pat. 269; Ex parte: *Mclean*, (1950) 43 C. L.R. 472.

Petition under Article 226 of the Constitution for issue of a writ of *certiorari* calling for records in T.N.S.C. Case No. 49 of 1974 and quash the same.

M. R. Narayanaswami, for Petitioner.

C. Chinnaswami, for Government Pleader, for Respondents.

The Court made the following

ORDER.—The interesting question falling for consideration in this petition is whether a motor transport worker as defined in section 2 (3) (*h*) of the Motor Transport Workers Act, 1961 (hereinafter referred to as the Central Act) is entitled to invoke the provisions of the Madras Shops and Establishments Act, 1947 (hereinafter referred to as the State Act) and prefer an appeal under section 41 (2) of the State Act to the Additional Commissioner for Workmen's Compensation against an order of dismissal passed against him by his employer. The petitioner which is a motor transport undertaking contends, that such an appeal cannot be filed and seeks a writ of *certiorari* or other appropriate writ or direction to quash the order of the first respondent herein holding that he is competent to hear the appeal preferred by the motor transport worker under section 41 (2) of the State Act.

2. The second respondent herein was employed as a conductor in the transport undertaking of the petitioner. Certain charges of misconduct were framed against him and after enquiry, the petitioner found him guilty of the charges and dismissed him from service. Thereupon the second respondent preferred an appeal to the first respondent in terms of section 41 (2) of the State Act. The petitioner raised two preliminary objections touching the maintainability of the appeal, the first being that it was an industrial

establishment governed by the Factories Act, 1948 the Central Act and therefore, it does not come under the purview of section 2 (3) and 2 (6) of the State Act; secondly, the second respondent was a motor transport worker as defined in section 2 (3) (*h*) of the Central Act, and therefore, an appeal under section 41 (2) of the State Act cannot be entertained. The first respondent following *A. B. Transport* v. *Ramakrishna*[1] overruled the preliminary objections and held that there was no repugnancy between the Central Act and the State Act and therefore, the second respondent is entitled to prefer an appeal under the State Act against the order of his dismissal.

3. Notice of this petition has been served on the second respondent, but he has not entered appearance. On behalf of the first respondent, no counter has been filed, but the learned Government Pleader states that if the files are necessary, the State is prepared to produce them for scrutiny by the Court.

4. Mr. M. R. Narayanaswami, learned counsel for the petitioner, in the course of his submissions, stated that the view taken by the first respondent is clearly unsustainable and the ratio laid down in *A. B. Transport* v. *Ramakrishna*[1], even if it be taken as a correct pronouncement, cannot throw any light on the controversy on hand; because, the arguments advanced in that case proceeded on different lines and not on the lines taken by the petitioner before the first respondent. The further argument of Mr. Narayanaswami is that *Amarnath* v. *Presiding Officer, Industrial Tribunal*[2], which was decided by a Full Bench of the Patna High Court, represents the correct position of law and it is the ratio in that case that must be applied to the case between the parties. Before dealing with the arguments of Mr. Narayanaswami, it is neccessary to refer to some of the provisions of the Central Act.

5. The Central Act came into force on 20th May, 1961, and it has been enacted 'to provide for the welfare of motor transport workers and to regulate the conditions of their work'. The Statement of Objects and Reasons published by Government for making the enactment is to the following effect:

> "There are at present certain enactments like the Motor Vehicles Act, 1939 and the Factories Act, 1948, which cover certain sections of motor transport workers and certain aspects of their conditions of employment. There is, however, no independent legislation applicable to motor transport workers as a whole or for regulating the various aspects of their conditions of employment, work and wages. It is considered desirable to have a separate legislative measure for motor transport workers which would cover matters like medical facilities, welfare facilities hours of work, spread-over, rest periods, overtime, annual leave with pay, etc., on an analogy of similar enactments for workers in factories, mines and plantations."

The definition of 'motor transport undertaking' and 'motor transport worker' occurring in section 2 (3) (*g*) and (*h*) of the Act requires careful examination and hence they are extracted below:

Section 2 (3) (*g*):

> " 'Motor transport undertaking means a motor transport undertaking engaged in carrying passengers or goods or both by road for hire or reward, and includes a private carrier."

Section 2 (3) (*h*):

> " 'Motor transport worker' means a person who is employed in a motor transport undertaking directly or through an agency, whether for wages or not, to work in a professional capacity on a transport vehicle or to attend to duties in connection with the arrival, departure, loading or unloading of such transport vehicles and includes a driver, conductor, cleaner, station staff, line checking staff, booking clerk, cash clerk, depot clerk, time keeper, watchman or attendant, but except in section 8 does not include:—
>
> (1) any such person who is employed in a factory as defined in the Factories Act (LXIII of 1948);

1. A.I.R. 1967 Ker. 225.
2. A.I.R. 1970 Pat. 269 (F.B.).

(*ii*) any such person to whom the provisions of any law for the time being in force regulating the conditions of service of persons employed in shops or commercial establishments apply."

Among other provisions contained in the Act there is provision for canteen (section 8), rest rooms (section 9), uniforms (section 10), medical facilities (section 11) and first-aid facilities (section 12). These are dealt with in Chapter IV, under heading 'Welfare and Health'. In Chapter V dealing with hours and lmiitations of employment, matters relating to hours of work, daily intervals for rest, spread-over, split duty, notice of hours of work, weekly rest, compensatory day of rest etc. have been dealt with. Chapter VI deals with employment of young persons and Chapter VII deals with wages and leave. Chapter VIII deals with penalties and procedure. Chapter IX contains miscellaneous provisions and one such provision is section 37. As per this section, the provisions of the Act are to have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of the Act. There is a proviso to the section which guarantees continuity of benefits to a motor transport worker under any award, agreement or contract of service if the terms therein are more favourable to the worker.

6. Looking at some of these provisions closely, we find that the definition of a 'motor transport worker' is of a two-fold character. In the earlier portion it is an inclusive definition, but in the later portion it is exclusive in character. The exclusive portion of the definition says that except in section 8 which deals with canteens, any employee in a factory as defined in the Factories Act, and any person to whom any law for regulating conditions of service of employees in shops or commercial establishments will not be a motor transport worker. In view of this categoric exclusion by Parliament, it has to be taken that a motor transport worker cannot invoke to his aid the provisions contained in the State Act. The Central Act has to be taken as an exclusive and comprehensive enactment in so far as the motor transport workers are concerned. However a learned Judge of the Kerala High Court has held in *A. B. Transport* v. *Ramakrishna*[1], that a motor transport worker can take advantage of some of the provisions contained in the Kerala Shops and Commercial Establishments Act, since there was no repugnancy, between the Kerala Act and the Central Act. On going through the judgment, I find that the approach by the learned Judge has been made from an entirely different angle. Taking it for granted that the Kerala Shops and Commercial Establishments Act as well as the Central Act are identical legislations and run on parallel lines, the learned Judge has placed the two enactments side by side and made an examination to find out whether the provisions in the Kerala State Act are repugnant to the provisions of the Central Act. With due respect to the learned Judge, it appears to me that such a comparative study has been made on the assumption that both the legislations are identical in scope and character and as such, they are available for comparison and contrast. It appears to me there is no scope at all for a comparative study being made of the two enactments because the two legislations are on different planes and operate in different fields. The Central Act has been enacted solely and exclusively to deal with the case of motor transport workers, whereas the State Act is general in character and would apply to all classes of persons employed in shops, commercial establishments, restaurants, theatres and other establishments. Such being the case, the well-known rule that the special excludes the general must be applied and in that view, it must be held that the Central Act excludes the applicability of the State Act to motor transport workers. Having regard to the expressions contained in the Central Act, it must be treated as an exhaustive and exclusive enactment and, once that conclusion is reached, then there is no scope at all for the provisions of that Act being compared with the provisions of the State Act in order to find out whether there is any repugnancy in the terms of the two enactments. As a matter of fact, the following passage occurring in *A. B. Transports* v. *Ramakrishna*[1], itself lends support to the view taken by me:—

1. A.I.R. 1967 Ker. 225, 226.

"The Supreme Court also cited with approval the following principle stated by Dixon, J., in Ex parte *Mclean*[1]":

"If it appeared that the Federal Law was intended to be supplementary to or cumulative upon State Law then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of sumultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which it's attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter".

7. As pointed out by Mr. Narayanaswami, I think the ratio laid down in *Amarnath* v. *Presiding Officer, Industrial Tribunal*[2], should have been followed by the first respondent with reference to the preliminary objections raised by the petitioner. The Full Bench which decided that case approved an earlier decision of that Court and held that even if the expression 'motor transport undertaking' be a commercial establishment: the Legislature certainly intended to keep such a commercial establishment out of the purview of the expression 'commercial establishment' as it is provided in exception to section 2 (*h*) of the Motor Transport Workers Act and if the Act applied to a motor transport undertaking, interpretation has to be put upon a motor transport worker in section 2 (*h*), which will be in harmony with section 1 (4) and section 3 (*a*) of the Central Act. I am in respectful agreement with the view taken in the abovesaid case. I therefore hold that the second respondent was not entitled to invoke section 41 (2) of the State Act and file an appeal to the first respondent against the order of dismissal. No doubt, it may be stated that by the exclusion of the State Act and its provisions, the second respondent will be left without a right of appeal. But, the second respondent is not left entirely without remedy because he can raise an industrial dispute, if so advised, against the order of dismissal. Even if such a remedy is not available to him, the Courts cannot substitute the absence of a provision in the Central enactment by having recourse to the State Act when the State Act has been clearly excluded from application by the Central Act.

8. For the aforesaid reasons, the petition will stand allowed ond the *rule nisi* will be made absolute. However, there will be no order as to costs.

S.J. ——— *Petition allowed.*

1. (1950) 43 C.L.R. 472.
2. A.I.R. 1970 Pat. 269 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and V. Sethuraman, JJ.*

Sri Ram and Company (Lessee of Sri Rama Rice Mill, Tiruppur) and others .. *Petitioners**

v.

The State of Tamil Nadu, represented by the Secretary to Government of Tamil Nadu, Department of Labour and Employment, Madras and another .. *Respondents.*

Minimum Wages Act (XI of 1948), *sections* 3, 5 *and* 9—*Minimum Wages (Tamil Nadu Rules* (1953), *rule* 12 *and Constitution of India* (1950), *Article* 226—*Wages of workers in dhall mill, rice mill and flour mill—Committee appointed by Government to recommend minimum wages — Functioning of committee under rule* 12—*Strict compliance with procedure necessary — Chairman's duty, regarding issue of notice of meeting to members—Failure to issue notice to a member due to misapprehension—No opportunity to employer's representative to participate in meetings — Committee submitting Reports to Government—Government issuing notification on the basis of report — Notification challenged on the ground that the Report was vitiated—Writ of* certiorari *issued.*

The Government appointed a Committee consisting of 8 members specified in a notification to hold enquiries and advise the State Government in the matter of revising the minimum rates of wages for employment in any dhall mill, rice mill and flour mill. Three of the members represented the employers and three the employees. One of the former was the Personnel Officer of the Century Flour Mills Ltd. He resigned and did not function after 31st May, 1975. Due to misapprehension the Chairman sent notice to that person but not the succeeding Personnel Officer of the Mill. The Committee submitted its report on 31st October, 1975. The Government issued a notification revising the minimum rates of wages on the basis of the report. This was challenged by the owners or letters of rice mills in Tiruppur and surrounding places.

Held: Though there were many meetings of the Committee after 31st May, 1975, no notice was issued to the then Personnel Officer of the Century Flour Mills Ltd., on account of the Chairman's misapprehension that the person who had resigned was by name a member of the Committee and in his place the mill had to substitute another. This misapprehension however cannot obliterate the fact that one of the representatives of the employers was not given an opportunity to participate in the meetings of the Committee subsequent to 31st May, 1975. The recommendations made by the Committee which were accepted by the Government were those by a committee which was not constituted and did not function in accordance with section 9 of the Minimum Wages Act read with rule 12 of the Minimum Wages (Tamil Nadu) Rules, 1953. [*Para*. 6.]

The Legislature has attached great importance to the equality of representation for the employers and employees in the Advisory Committee. When that equality is not available and the balance sought to be maintained by the Legislature is disturbed, that will constitute a serious disregard of the provisions of section 9 of the Minimum Wages Act. [*Para*. 12.]

Since the constitution and the functioning of the Committee in the present case was not in accordance with the statutory provisions in that behalf, its advice which was accepted by the Government was vitiated, and consequently the notification of the Government had become illegal. [*Para*. 11.]

Cases referred to:—

Tiffin's Barytes Asbestos and Paints Ltd. v. *Ministry of Labour and Employment, Government of India,* I.L.R. (1973) A.P. 495, *M/s. Town Bidi Factory* v. *State of Orissa,* I.L.R. (1975) Cut. 308; *A. S. D. Badsha, Proprietor, Bashas Snuff Co.* v. *State of Madras,* A.I.R. 1963 Mad. 138; *P. Gangadharan Pillai* v. *State of Kerala,* A.I.R. 1968 Ker. 218; *Edward Mills, Co. Ltd., Bewar*

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*W.P. Nos. 3398 and 3703 to 3713 of 1976 and 606 to 616 and 728 to 736 of 1977. 22nd August, 1978.

v. *State of Ajmer,* 1955 S.C.J. 42: (1955) 1 M.L.J. (S.C.) 1: A.I.R. 1955 S.C. 25; *M/s. Bhikusa Yamasa Kshtriya* v. *Sangamer Akola Taluk Bidi Kamgar Union,* A.I.R. 1963 S.C. 806; *Chandra Bhawan Boarding and Lodging* v. *State of Mysore,* (1970) 2 S.C.R. 600: A.I.R. 1970 S.C. 2042; *State of Rajasthan* v. *Hariram Nathwani,* (1975) 2 S.C.C. 517: (1976) 1 S.C.R. 641: A.I.R. 1976 S.C. 277; *Bijoy Cotton Mills Ltd.* v. *State of Ajmer,* 1955 S.C.J. 51: (1955) 1 S.C.R. 752: (1955) 1 M.L.J. (S.C.) 10: A.I.R. 1955 S.C. 33.

Petitions under Article 226 of the Constitution of India praying the High Court to issue a writ of *certiorari* calling for records in G. O. Ms. No. 670, Labour and Employment, dated 16th July, 1976 and to quash the Notification issued by the Government of Tamil Nadu under section 5 (2) of the Minimum Wages Act, etc.

M. R. Narayanaswamy, M. Manoharan, K. Duraiswami, P. Sathasivam, R. Nallathambi and *V. Radhakrishnan,* for Petitioners.

N. R. Chandran, for Government Pleader, for Respondents.

The Order of the Court was made by

Ismail, J.—These are petitions by the owners or lessees of rice mills in Tiruppur and surrounding places filed under Article 226 of the Constitution of India, praying for the issue of writs of *certiorari* to quash the order of the Government made in G.O. Ms. No. 670, Labour and Employment, dated 16th July, 1976. That was a notification issued by the Government under clause (*b*) of sub-section (1) and sub-section (3) of section 3 and sub-section (2) of section 5 of the Minimum Wages Act, 1948 (Central Act XI of 1948) hereinafter referred to as the Act, revising the minimum rates of wages revised in the Industries, Labour and Co-operation Department Notification No. 911 of 1961, dated 22nd February, 1961, published in the Fort St. George Gazette, dated 1st March, 1961. The said Notification was published in the Tamil Nadu Government Gazette, dated 28th July, 1976.

2. Though several grounds have been urged in the affidavits filed in support of these writ petitions, to challenge the validity of the aforesaid notification, since we are allowing these writ petitions on a very short ground, it is unnecessary to refer to all those grounds. Section 3 of the Act provides for the appropriate Government fixing minimum rates of wages for various employees as well as revising those rates from time to time. Section 5 of the Act deals with the procedure for fixing and revising minimum wages. Section 5 (1) of the Act provides that in fixing minimum rates of wages in respect of any scheduled employment for the first time under this Act or in revising minimum rates of wages so fixed, the appropriate Government shall either—

"(*a*) appoint as many committees and sub-committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision, as the case may be, or

(*b*) by notification in the Official Gazette, publish its proposals for the information of persons likely to be affected thereby and specify a date, not less than two months from the date of the notification, on which the proposals will be taken into consideration".

Sub-section (2) of this section states that after considering the advice of the Committee or Committees appointed under clause (*a*) of sub-section (1), or as the case may be, all representations received by it before the date specified in the notification under clause (*b*) of that sub-section, the appropriate Government shall, by notification in the Official Gazette, fix, or as the case may be, revise the minimum rates of wages in respect of each scheduled employment and unless such notification otherwise provides, it shall come into force on the expiry of three months from the date of its issue. The proviso to sub-section (2) of section 5 states that where the appropriate Government proposes to revise the minimum rates of wages by the mode specified in clause (*b*) of sub-section (1), the appropriate Government shall consult the Advisory Board also. Section 9 deals with composition of the committees, sub-committees and Advisory Board and that section states—

"Each of the committees, sub-committees and the Advisory Board shall consist of persons to be nominated by the appropriate

Government representing employers and employees in the scheduled employments, who shall be equal in number and independent persons not exceeding one-third of its total number of members; one of such independent persons shall be appointed the Chairman by the appropriate Government."

There is no dispute that the rice mill industry is one of the scheduled employments because it is item 2 in Part I of the Schedule to the Act.

3. Proceeding to act pursuant to these statutory provisions, the Government issued a notification in G.O. Ms. No. 1696, Labour Department, dated 24th December, 1971, under section 5 (1) (*a*) of the Act for the purpose of revising the minimum rates of wages. Under that notification the Government appointed a Committee consisting of the members specified therein to hold enquiries and advise the State Government in the matter of revising the minimum rates of wages for employment in any dhall mill, rice mill or flour mill. The notification gave eight persons as the members of the Committee. The first and the second members were the Special Deputy Commissioner of Labour, Madras-5, who was also designated as Chairman, and the Assistant Director of Statistics (Market Intelligence), Madras-6. Members 3 to 5 were the representatives of employers, the third member being the Honorary General Secretary, District Rice Flour and Oil Mill Owners' Association, Manjakuppam, Cuddalore N.T., South Arcot District, the fourth member being the Secretary, Century Flour Mills Ltd., Madras-1, and the fifth member being Thiru A.S.K.R. Rabindran, nominee of A.S.K. Ramaswami Nadar and Sons, Dhall Factory, Virudhunagar. Members 6 to 8 were the representatives of employees, the sixth member being Thiru T. M. Varadarajulu, nominee of Tamil Nadu Oil, Flour Mills and General Workers' Union, Madras, the seventh member being the Secretary, Coimbatore District General Workers Union, Tiruppur, and the eighth member being the President, Madurai General Workers Union, Madurai. After the constitution of the Committee, two representatives of the employers, namely, the third and the fifth members ceased to be members of the Committee, the former having died and the latter having failed to attend three consecutive meetings. The Government issued G.O. Ms. No. 993, Labour, Employment and Housing Department, dated 9th October, 1974, appointing two other members in the places of Nos. 3 and 5 already referred to. The Committee finally submitted its report, dated 31st October, 1975. It is on the basis of the said report, that the Government issued the impugned notification. The learned Government Pleader admits that the Government accepted the recommendations of the Committee and only on such acceptance the Government Order in question was issued.

4. One of the complaints of the petitioners herein was that the fourth member, a representative of the employers, had ceased to function after a certain stage, that the said membership fell vacant and the Government did not fill up the vacancy and that consequently the proceedings of the Committee were vitiated which in turn vitiated the final notification issued by the Government. For the purpose of understanding this argument, it is necessary to refer to certain facts. As we have already pointed out, the fourth member was the Secretary, Century Flour Mills Ltd., Madras-1. Thus it will be seen that the person who was appointed as a member of the Committee was not any person by name but one holding a particular position in the Century Flour Mills Ltd., Madras-1. In its letter dated 17th January, 1972, the Century Flour Mills Ltd., Madras-1, requested that instead of its Secretary, its Personnel Officer might be nominated as member of the Committee. This request of the Century Flour Mills Ltd., Madras-1, was accepted by the Government and G.O. Ms. No. 1123, Labour and Employment Department, dated 15th July, 1972 was issued. By this Government Order, the nomenclature of the fourth member was changed from 'Secretary' to 'Personnel Officer'. Thus, it is clear that the Personnel Officer of the Century Flour Mills Ltd., Madras-1, became a member of the Committee representing the employers. Such Personnel Officer was one Thiru R. B. Krishnan. The said Thiru R. B. Krishnan, attended the meetings of the Committee till 31st May, 1975 on which date he sent a letter to the Chairman of the Committee sta-

ting that as he had left the services of Century Flour Mills Ltd., Madras, he would be no longer able to serve on the Committee and consequently requesting that his resignation from the membership of the Committee might be accepted. The file produced by the learned Government Pleader shows that even after Thiru R. B. Krishnan had written this letter, a notice of the meeting, dated 2nd June, 1975 convening the meeting of the Committee to be held on 18th June, 1975 at Salem and on 19th July, 1975 at Coimbatore, was sent to him by name. We also find from the file that on 29th July, 1975, a notice convening the meeting of the Committee to be held on 12th August, 1975 at Madras, was sent to the Managing Director, Century Flour Mills Ltd., Madras-1. Thereafter we find from the file that on 16th August, 1975 the Chairman of the Committee has sent a communication to the Manager, Century Flour Mills Ltd., Madras-1, stating that he would like to draw his attention to the earlier letter, dated 9th July, 1975, and requesting that he might be informed, if in view of the Secretary of the Century Flour Mills, having resigned, the Mill was willing to continue its representation on the Committee by making suitable alternative arrangements. It is stated that there was no response from the Mills in question. Subsequently on 12th September, 1975, the Chairman of the Committee addressed the Government intimating the Government of the fact of the resignation of his membership of the Committee from 31st July, 1975 by Thiru R. B. Krishnan and the steps he had taken to contact the Century Flour Mills and recommending that one Thiru R. Thangaswami, B.Sc., B.L., of Coimbatore, who was legal Adviser of the Tiruppur Rice Merchants Association, might be appointed as a member in the vacancy of Thiru R. B. Krishnan. However, the Government did not take any action immediately and as we have pointed out already the Committee itself submitted its report on 31st October, 1975. Thereafter the Government wrote a letter to the Commissioner of Labour on 11th December, 1975 stating that since the Committee had submitted its report, the question of filling up the vacancy in the Committee did not arise, and that therefore, no further action was necessary in that regard.

5. It is on the basis of these facts that the contention was advanced before us that there was no proper constitution of the Committee as contemplated by section 9, in view of the vacancy of one of the representatives of the employers not being filled up, and that therefore the ultimate order of the Government revising the minimum rates of wages on accepting the recommendations of the said Committee was also vitiated. From the facts stated above one thing is clear and that is, after 31st May, 1975, Thiru R. B. Krishnan did not participate in the meetings of the Committee. Notwithstanding the resignation letter received from Thiru R. B. Krishnan, the Chairman of the Committee sent a notice of the meeting to Thiru R. B. Krishnan and also sent one notice to the Managing Director of the Century Flour Mills Ltd., Madras-1. This procedure on the part of the Chairman was not really warranted and in fact was misguided. As we have pointed out already, no individual belonging to or concerned with the Century Flour Mills Ltd., was appointed to the Committee by name and the person who was appointed to the Committee was a particular Officer of the Mills, namely, originally the Secretary and subsequently the Personnel Officer. Consequently whoever happened to be the Personnel Officer for the time being would be a member of the Committee and the fact that Thiru R. B. Krishnan ceased to be the Personnel Officer would not cause any vacancy in the committee, because the successor Personnel Officer would automatically become a member of the committee. Unfortunately, this position was not realised by the Chairman of the Committee and that was the reason why he went on sending notice to Thiru R. B. Krishnan himself as if he was personally a member of the Committee and subsequently to the Managing Director of the Century Flour Mills Ltd.; Madras-1 as if he was a member of the Committee, and thereafter requested the Manager of the Mills to nominate a successor as if the nominee of the Century Flour Mills Ltd., should be a member of the Committee. From what we have pointed out above, it is clear that the Personnel Officer of the Century Flour Mills Ltd., was a member of the Committee, as representative of the employers, and that

member did not function after 31st May, 1975.

6. The next question for consideration is, what is the inference to be drawn from the non-functioning of the said member. If that member had merely abstained from attending the meetings of the Committee, the petitioners herein cannot have any grievance and no blame can be attached to the Government. From what we have stated above, once Thiru R. B. Krishnan ceased to be the Personnel Officer of the Century Flour Mills Ltd., Madras, the succeeding Personnel Officer should have automatically taken his place in the committee and the notice of meetings should have been sent to him. But, admittedly no such notice was sent to the Personnel Officer of the Company as such. According to rule 12 of the Minimum Wages (Tamil Nadu) Rules, 1953, 'the Chairman shall fix the date, time and place of every meeting and notice in writing containing the aforesaid particulars along with a list of business to be conducted at the meeting shall be sent to each member by registered post at least 15 days before the date fixed for such meeting, provided that in the case of an emergent meeting, notice of atleast seven days shall be given to every member'. Consequently, an obligation has been cast on the Chairman of the Committee to issue a notice for the meeting of the Committee to its members, and in this particular case, as we have pointed out already, after 31st May, 1975, though there were many meetings of the Committee, even for a single meeting, no notice was issued to the then Personnel Officer of the Century Flour Mills Ltd., Madras. Of course, this has resulted on account of the misapprehension on the part of the Chairman of the Committee that it was Thiru R. B. Krishnan by name who was a member of the Committee and that therefore, in his place the Century Flour Mills had to substitute another person, but that misapprehension cannot obliterate the fact that one of the representatives of the employers was not given the opportunity to participate in the meetings of the Committee subsequent to 31st May, 1975. The result is that the recommendations made by the Committee which were accepted by the Government were those by a committee which was not constituted and did not function in accordance with section 9 of the Act read with rule 12 of the Minimum Wages (Tamil Nadu) Rules, 1953.

7. The next question is, what is the consequence of this position in law? Mr. M. R. Narayanaswami, learned counsel for some of the petitioners, contended that the consequence is that the entire notification which was issued by the Government has become vitiated, and therefore, is liable to be quashed. The learned Government Pleader on the other hand, sought to contend that there had been no failure on the part of the Government, that if a particular member did not participate in the meetings of the committee, the Government could not be blamed and that therefore, the ultimate notification issued by the Government cannot be challenged. This argument is misconceived, in view of the fact that there was no failure on the part of the Personnel Officer for the time being of the Century Flour Mills Ltd., to participate in the meetings after 31st May, 1975, because no notice of any meeting whatever was admittedly sent to such Personnel Officer after 31st May, 1975.

8. Mr. K. V. Sankaran, representing Mr. Ganesan, who appears for the Coimbatore District General Workers Union, represented by its President, impleaded as a party to W.P. No. 3714 of 1976, contended that the recommendations of the Committee are only in the nature of advice given to the Government that the Government are not bound to accept the advice and that consequently any contravention of section 9 in the constitution of the Committee or any irregularity in the functioning of the Committee contrary to rule 12 of the Minimum Wages (Tamil Nadu) Rules referred to already will not in any way vitiate the ultimate notification issued by the Government either fixing the minimum wages or revising the minimum wages already fixed. We are unable to accept this argument. We are of the opinion that any such irregularity in the constitution of the Committee contrary to section 9 of the Act or in the functioning of the Committee without notice to a member of the Committee will certainly vitiate the recommendation of the Committee and the ultimate order of the Government based on such recommendation. It should not be forgotten that the Legislature

has taken very great care in the composition of the Committee, as contemplated by section 9, by providing that the employers and employees should have equal representation. Once this equality is disturbed, the balance which the Legislature sought to maintain between the employers and employees will be lost, and consequently, the sanctity which is sought to be attached to this equality of membership as between the employers and employees will also be destroyed. In such a situation, the recommendation by the Committee cannot be said to be one as contemplated by the statute and if the Government accept that recommendaion and pass an order, the said order also will be vitiated.

9. Mr. K. V. Sankaran, learned counsel representing the employees, submitted that the decision of the Andhra Pradesh High Court in *Tiffin's Barytes Asbestos and Paints Ltd.* v. *Ministry of Labour and Employment, Government of India, rep. by its Secrtary, New Delhi*[1], the decision of the Orissa High Court in *M/s. Town Bidi Factory and others* v. *State of Orissa*[2] and the decision of this Court in *A. S. D. Badsha proprietor, Bashas Snuff Co.* v. *State of Madras represented by Commissioner of Labour and Director, National Employment Organisation*[3], have taken the view that the contravention of section 9 of the Act will vitiate the ultimate notification issued by the Government under section 5, but that there is a direct decision of the Kerala High Court in *P. Gangadharan Pillai* v. *State of Kerala*[4], holding that that will not be the consequence and that the trend of the decisions of the Supreme Court also will lead to that conclusion. However, Mr. Sankaran admitted that there is not a single decision of the Supreme Court directly on the point, namely, that if there is contravention of section 9 in the composition of the Committee contemplated therein, that will not vitiate the notification issued by the Government under section 5 of the Act. However, what he contended was that the approach of the Supreme Court in some of the cases relating to the power of the Government to fix minimum wages under section 5 of the Act would lead to such a conclusion. The learned counsel drew our attention to the decisions of the Supreme Court in *Edward Mills Co., Ltd., Bewar* v. *State of Ajmer*[1], *Messrs. Bhikusa Yamasa Kshatriya* v. *Sangamer Akola Taluk Bidi Kamgar Union*[2]; *Chandra Bhawan Boarding and Lodging* v. *State of Mysore*[3] and *State of Rajasthan* v. *Hariram Nathwani*[4]. We are unable to discern any such trend or approach as contended for by the learned counsel for the employees, namely, that the approach of the Supreme Court was to ignore all contraventions of the statutory provisions and to uphold the ultimate notification issued by the Government under section 5 solely on the ground that it was the Government which had to ultimately decide the matter and that the Committees are only fact-finding Committees and their advice and recommendation are not binding on the Government. In view of this, we are of the opinion that these decisions are not of any assistance to decide the present controversy before us.

10. On the other hand, the following observations of the Supreme Court in *Bijay Cotton Mills Ltd.* v. *State of Ajmer*[5], will show the necessity for the Government complying with the requirements of section 9 of the Act strictly. In that judgment, the Supreme Court observed:

> "As regards the procedure for the fixing of minimum wages, the 'appropriate Government', has undoubtedly been given very large powers. But it has to take into consideration, before fixing wages, the advice of the Committee if one is appointed, or the representations on its proposals made by persons who are likely to be affected thereby. Consultation with advisory bodies has been made obligatory on all occasions of revision of minimum wages; and section 8 of the Act provides for the appointment of a Central Advisory Board for the purpose of advising the

1. I.L.R. (1973) A.P. 495.
2. I.L.R. (1975) Cuttack 308.
3. A.I.R. 1963 Mad. 138.
4. A.I.R. 1968 Ker. 218.

1. 1955 S.C.J. 42: (1955) 1 M.L.J. (S.C.) 1: A.I.R. 1955 S.C. 25.
2. A.I.R. 1963 S.C. 806.
3. (1970) 2 S.C.R. 600 : A.I.R. 1970 S.C. 2042.
4. (1975) 2 S.C.C. 517: (1976) 1 S.C.R. 641 : A.I.R. 1976 S.C. 277.
5. 1955 S.C.J. 51 : (1955) 1 S.C.R. 752 : (1955) 1 M.L.J. (S.C.) 10 : A.I.R. 1955 S.C. 33.

Central as well as the State Government both in the matter of fixing and revision of minimum wages.

Such Central Advisory body is to act also as a co-ordinating agent for co-ordinating the work of the different advisory bodies. In the committees or the advisory bodies the employers and the employees have an equal number of representatives and there are certain members besides them who are expected to take a fair and impartial view of the matter. These provisions, in our opinion, constitute an adequate safeguard against any hasty or capricious decision by the appropriate Government".

In our view, the above observations will only indicate that the procedure for the appointment of a committee, constituting adequate safeguards against any hasty or capricious decision by the Government must be strictly followed and complied with.

11. That leaves out only the decision of the Kerala High Court in *Gangadharam Pillai* v. *State of Kerala*[1], already referred to, on which reliance has been placed by the learned counsel for the employees. That is a decision of a single Judge of that High Court and in paragraph 5 of that judgment, it is stated:—

"The Advisory Board constituted in the instant case consisted of seventeen representatives each of employers and employees and four Government officials. Among the representatives of the employers, the only one representing the cashew industry was one Sri P. G. Verghese, who died before the Advisory Board formulated its recommendations to the Government (*vide* Exhibit P-5). It was admitted that none was nominated in his place and that the Advisory Board proceeded with its business and sent up its recommendations (Exhibit P-5) without the vacancy being filled up. These recommendations were not accepted by the Government, which by its final notification (Exhibit P-4) accepted its draft notification".

It is this position which was considered by the learned Judge in paragraph 8 of his judgment, where the learned Judge has stated:—

"Was there any illegality consequent on the failure to nominate a member to the Advisory Board on the death of Sri P. G. Varghese?—is the next question. There is no doubt that the fixation or revision of minimum wages is to be done in accordance with the provisions of the Act, and that consultation with the Advisory Board as contemplated by section 9 of the Act is a necessary requirement of such fixation or revision. The Advisory Board with which consultations is effected must have the statutory personnel and composition enjoined by section 9 of the Act. This, at the material time it did not have in the instant case. But it appears to me that this does not vitiate the ultimate decision of the Government in the Notification, Exhibit P-4, issued by it. The function of the Advisory Board was purely advisory; the Government was not bound by its advice; the ultimate decision had to be taken by the Government. In this view, I am inclined to think that notwithstanding the defect in the composition of the Advisory Board the notification Exhibit P-4 is not vitiated by any illegality".

We are of the opinion that the above observation is not of any assistance whatever to the employees in the present case, for the simple reason that the learned Judge in that case was dealing with a situation where the recommendation of the Advisory Board was not accepted by the Government and the Govermment took its own decision in fixing the minimum wages. As a matter of fact, the learned Judge himself in paragraph 9 of the judgment has observed:—

"It may be that if the constitution of the Advisory Board was in total disregard of the provisions of section 9 and its advice was accepted and acted upon by the Government, the proceedings might become illegal—*vide N. K. Jain* v. *Labour Commissioner, Rajasthan*[1]. But such was the position here, and as to this I need not express any opinion".

1. A.I.R. 1968 Ker. 218.

1. A.I.R. 1957 Raj. 35.

But, the position that was not before the learned Judge of Kerala High Court who decided the above case is here before us. Therefore, it is unnecessary to express any opinion about the correctness or otherwise of the view taken by the learned Judge of Kerala High Court, even with regard to a case where the advice of the committee had not been accepted by the Government. However, even on the basis of the observation of the learned Judge extracted above, it must be held that since the constitution and the functioning of the committee in the present case was not in accordance with the statutory provisions in that behalf, its advice which was accepted by the Government was vitiated, and consequently the notification of the Government has become illegal.

12. We have already referred to the importance which the Legislature has attached to the equality of representation for the employers and employees in the Advisory Committee. When that equality is not available and the balance sought to be maintained by the Legislature is disturbed, that will constitute a serious disregard of the provisions of section 9 of the Act.

13. Having regard to all the above circumstances, we hold that the impugned notification of the Government is illegal and allow these writ petitions and issue writs of *certiorari* quashing the said notification. There will be no order as to costs.

S.J. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Regional Director, Employees' State Insurance Corporation, Madras-34 .. *Appellant**

v.

M. M. Rubber Co., (P.), Ltd., Madras .. *Respondent.*

Employees' State Insurance Act (XXXIV of 1948), section 2 (22)—Production bonus, if "wages" as defined in section 2 (22)—To be taken into account in computing the employer's contribution under the Act.

Under a memorandum of settlement between the employer and the employees under section 12 (3) of the Industrial Disputes Act, 1947, production bonus became payable to workers. Though the management was taking the production bonus as wages for the purpose of contribution under the Employees' State Insurance Act, for some time, subsequently the management wrote to the Employees' State Insurance Corporation stating that the bonus paid to the workers would be excluded for the purposes of computing the contribution under the Act. As the corporation did not accept this the management approached the Employees' State Insurance Court which held that the production bonus need not be taken into account in computing the employer's contribution. On appeal by the Regional Director of Employees' State Insurance Corporation,

Held: The question as to whether a particular amount paid constituted 'wages' or not had to be decided with reference to the particular facts of each case. In order to fall within the scope of Part I of the definition (of 'wages' in section 2 (22) of the Act), it should be remuneration payable to an employee under the terms of a contract of employment, express or implied. The amount payable should be capable of being demanded as a matter of right. The employer should not be in a position to withdraw from

* A.A.O. No. 252 of 1976. *6th October*, 1978.

the agreement at his discretion. There was nothing preventing an agreement between the employer and the employee being traced to more than one document. [*Para.* 8.]

Even though the original contract of employment between the parties did not provide for the payment of productivity or incentive bonus in the present case, the amount became payable as a result of a memorandum of settlement entered into before the Labour Officer. It had thus all the elements of a contract of employment between the employer and the employee. This was not a case where the employer could withdraw from the agreement as his will. Thus the payment fell within the first part of the provision. [*Para.* 9.]

So long as production had increased beyond the minimum fixed and so long as the employee had thus become entitled to the bonus in accordance with the terms of the agreement, then the amount paid by him would fall within the scope of, section 2 (22) and would thus be 'wages'. [*Para.* 10.]

Cases referred to:—

Braithwaite and Co. v. *Employees' State Insurance Corporation*, (1968) 2 S.C.J. 858: (1968) 1 S. C. R. 771: (1968) 1 Lab.L.J. 550: A. I. R. 1968 S.C. 413; *Bengal Potteries Ltd.* v. *Employees' State Insurance Corporation*, (1975) 47 F.J.R. 428; *Employees' State Insurance Corporation* v. *Mysore Kirloskar Ltd.*, (1975) 47 F.J.R. 434; *Carborundum Universal* v. *Employees' State Insurance Corporation*, (1976) 3 Lab.L.J. 17: 1975 K.L.T. 842: 49 F.J.R. 361; *Employees' State Insurance Corporation* v. *Andhra Pradesh Paper Mills Ltd.*, (1977) 51 F.J.R. 388: 1977 A.L.T. 509: 1978 Lab.I.C. 19: (1978) 1 Lab.L.J. 469: A.I.R. 1978 A. P. 18; *Employees' State Insurance Corporation* v. *Vazir Sultan Tobacco Co., Ltd.*, (1972) 2 Lab.L.J. 602; *Employees' State Insurance Corporation* v. *Hyderabad Asbestos Cement Products Ltd.*, (1976) 49 F.J.R. 365.

Appeal against the order of the Employees' State Insurance Court, Madras in E.I.O.P. No. 14 of 1974.

S. M. Ali Mohamad, for Appellant.

M. R. Narayanaswami, for Respondents.

The Court made the following

ORDER.—This is an appeal against the judgment in E.I.O.P. No. 14 of 1974, dated 26th November, 1975, of the Employees' State Insurance Court, Madras. The judgment came to be delivered on a petition under section 75 of the Employees' State Insurance Act, praying for a declaration that the production bonus paid to the employees in accordance with the provisions of a settlement dated 13th April, 1970, was not wages as defined under section 2 (22) of the Employees' State Insurance Act, 1948. The respondent is a factory in Madras where, foam rubber, articles are manufactured with the help of 150 workmen. The employees are insured under section 38 of the Act. Contribution as contemplated by the provisions of the Act was recovered from the wages of all the insured persons and the amount so recovered along with the employers contribution was remitted to the Corporation by the respondent. On 13th April, 1970, there was a memorandum of settlement under section 12 (3) of the Industrial Disputes Act, 1947. Under the said settlement, production bonus became payable to the workers. The respondent was deducting the contribution even on the amount paid as production bonus treating it as wages, and was also making its own contribution on that basis upto July, 1973. On 17th August, 1973, the respondent wrote to the Employees' State Insurance Corporation stating that the bonus paid to the workmen would be excluded for the purpose of computing the contribution payable under the Act. As the Corporation did not accept the interpretation and insisted upon the respondent paying the contribution, the petition was filed under section 75 of the Act.

2. Before the Employees' State Insurance Court, the contention taken on behalf of Regional Director, Employees' State Insurance Corporation, was that the memorandum of settlement was only a revised bonus scheme which was already in force, that it was a bilateral act, on the part of the employer and the employees and that the production bonus had therefore to be

included in the 'wages' as defined under the Act for the purpose of computing the contribution payable by the employees. The Insurance Court went into the question whether the amount paid to the employees as production bonus in accordance with the settlement, dated 13th April, 1970, fell within the term 'wages' under section 2 (22) and whether the Corporation was justified in demanding the contribution in respect of production bonus. After considering the respective contentions, the Court below held that the production bonus had not to be taken into consideration in calculating the employees' contribution or the employer's contribution under the Act. The Regional Director has now filed the present appeal contending that the construction placed under section 2 (22) of the Act by the Court below is wrong.

3. The only question that arises for consideration is whether the production bonus comes within the scope of section 2 (22) of the Act. Before proceeding to consider the scope of the said provision, reference may now be made to a few of the terms of the memorandum of settlement entered into under section 12 (3) of the Industrial Disputes Act, 1947, before the Labour Officer on 13th April, 1970. The employees placed a charter of demands by their letter, dated 21st November, 1968 addressed to the Company. The charter of demand not having been met, the dispute was referred to the Labour Officer, II, Madras, and in the course of the said reference, a settlement came to be entered into. Annexure I to the agreement deals with the production bonus scheme. The bonus scheme is based on the total number of 'cures' produced free of defects over the minimum 'cures' fixed for each 'box'. The minimum 'cures' fixed for each 'box' would not earn any production bonus, but when the production exceeded the minimum cures, production bonus was payable. If production was less than the minimum prescribed for any reason whatsoever, no production bonus would be payable. Production scheduling was entirely at the discretion of the management. The production schedule, the number and the choice and the combination and the arrangement of moulds to be fed into the vulcanisers were all entirely at the discretion of the management. The question as to whether the amount paid under the above scheme can be called 'wages' falling within the scope of section 2 (22) of the Employees' State Insurance Act has now to be gone into.

4. Section 2 (22) of the Act which is the only relevant provision to be noticed runs as follows:

"2. In this Act, unless there is anything repugnant in the subject or context—(22) 'wages' means all remuneration paid or payable in cash to an employee if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lockout, strike, which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include.

(*a*) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(*b*) any travelling allowance or the value of any travelling concession;

(*c*) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(*d*) any gratuity payable on discharge."

It may be seen that the main part of section 2 (22) of the Act forms into three parts: (*i*) all remuneration paid or payable in cash to the employee, if the terms of the contract of employment, express or implied, were fulfilled; (*ii*) any payment to an employee in respect of any period of authorised leave, lockout, strike which is not illegal or lay-off; and (*iii*) other additional remuneration, if any, paid at the intervals not exceeding two months. There are certain payments set out in (*a*) to (*d*) above which are excluded from the concept of wages. It is unnecessary to go into the provisions relating to the exclusion, as in the present case it is not the contention of either side that it falls within clauses (*a*) to (*d*) of the provision. Even with reference to the main part of section 2 (22) of the Act, the present case does not fall within the scope of the second part

of the provision. The question has thus to be considered in the light of the language that have been earlier described as items (*i*) and (*iii*).

5. The Supreme Court in *Braithwaite and Co.* v. *Employees State Insurance Corporation*[1], had to deal with a somewhat similar question. In that case, the workers were given what was called 'inam'. The payment of inam was dependent upon the employees exceeding the target of output appropriately applicable to him. Though the right to receive the inam is dependent on the efficient working of the employees, there was a clause in the agreement which laid down that if the target were not exceeded due to lack of orders, lack of materials, break-down of machinery, lack of labour, strike, etc., then no inam would be awarded. If the employer did not receive sufficient orders for the sale of the output or there was shortage of raw materials or breakdown of machinery as a result of which it became impossible for the employee to reach the minimum target fixed, there was no liability on the employer to pay inam. It was also made clear to the workmen in that scheme that the payments of reward or inam were in no way connected with or part of wages. The Calcutta High Court in the appeal before it, held that the inam paid under the scheme was covered by the word 'remuneration' used in the definition of 'wages' and before the Supreme Court the counsel appearing for the company did not challenge the correctness of the view. The only contention that was urged was that the payment had not become a term of contract of employment with the employees. It was held that the terms on which the inam was payable were inconsistent with the scheme having become a part of the contract of employment. It was pointed out by the Supreme Court that the company had reserved the right to withdraw the scheme altogether without assigning any reasons and that the payment of the inam was dependent on various other factors'. With reference to the terms of that agreement at page 417, it was pointed out—

"In fact, in this case, there was no question of offer by the appellant (company) and acceptance by the employees as a condition of their service. The employees were already working in accordance with the terms of their contract of employment when the employer decided to make this extra payment if the employees did successfully what they were already expected to do under that contract. It cannot, therefore, be held that this payment of inam ever became even an implied term of the contract of employment of the employees of the appellant."

The scheme was considered to be 'a one-sided promise'. Therefore, the decision of the High Court holding that the amount came within the scope of section 2 (22) was set aside. It is also clear from the judgment of the Supreme Court that it dealt with only the first part of the definition of the term 'wages' as analysed above. The real test employed by the Supreme Court was whether the payment of inam was enforceable as one of the terms of the contract of employment, whether implied or express. As it was held that the payment of inam did not even become an implied term of the contract of employment, the payment in that case wholly fell outside the scope of section 2 (22). I do not find that this decision of the Supreme Court covers the facts here. That decision has to be understood in the light of the terms of the agreement.

6. My attention was drawn to the decision of the Calcutta High Court in *Bengal Potteries Ltd.* v. *Employees' State Insurance Corporation*[1]. In that case also, a provision for payment of incentive bonus came to be considered. In the scheme it was agreed to between the parties that it was not paid as part of the terms of employment to any workman'. Though such a provision may not be conclusive on the question whether the payment forms part of the terms of the employment or not, it was certainly an indication which the Court was entitled to and did take into consideration. With reference to the terms of this agreement it was held that it fell within the scope of the decision of the

1. (1968) 2 S.C.J. 858 : (1968) 1 S.C.R. 771 : A.I.R. 1968 S.C. 413.

1. (1975) 47 F.J.R. 428.

Supreme Court considered above and that the amount did not form part of wages. Similarly in *Employees' State Insurance Corporation, Bangalore* v. *Mysore Kirlosker Ltd.*[1], there was an incentive payment made voluntarily by an employer and he had a right to withdraw or revise the scheme. It was held following the decision of the Supreme Court and also of the Calcutta High Court considered above that it did not form part of the wages. It can be seen that these cases also depended on the nature of the contract between the employer and the employees.

7. The Kerala High Court in *Carborundum Universal* v. *Employees' State Insurance Corporation*[2], dealt with a similar problem. In that case also, there was a settlement between the parties. The employer had no right to withdraw the scheme without the consent of the other party or without reference to the proceedings warranted by law. The workmen would not earn the incentive bonus if the performance fell below the prescribed norm, but once their performance exceeded the norm, they got the remuneration as a matter of right. On these facts, it was held that the amount paid fell within the term 'wages' as defined in the Act. A Full Bench of the Andhra Pradesh High Court in *Employee's State Insurance Corporation, Hyderabad* v. *Andhra Pradesh Paper Mills Ltd.*[3], considered the includibility of an incentive bonus or production bonus in the concept of wages. There were two decisions of the said High Court which apparently appeared to be inconsistent and hence the reference to the Full Bench. In *Employee's State Insurance Corporation* v. *Vazir Sultan Tobacco Co., Ltd.*[4], the employees were eligible for an annual bonus provided the maximum target of ten hour was reached. Bonus was however paid in advance but was finally adjusted. It was held that the bonus paid by the company to its employees did not fall within the scope of section 2 (22) of the Act. In another decision of the same High Court in *Employees' State Insurance Corporation* v. *Hyderabad Asbetos Cement Products Ltd.*[1], the management introduced a scheme to pay some incentives to the workmen. The bonus was payable every month if the production exceeded a minimum target. There was no clause enabling the management to withdraw or modify the scheme at its discretion. It was on these facts held that the amount paid came within the scope of 'wages'. After noticing these two decisions and several others the Full Bench held that the incentive bonus paid by the company constituted 'wages' within the scope of the Act. The principle of the decision was set out as follows:

> "The result of the above discussion is that in order to fit into the definition of 'wages' so far as the incentive bonus or productivity bonus scheme is concerned, the terms of the scheme must be examined and it must be ascertained whether the bonus paid under the scheme is part of the terms of the contract of employment as was the case in *Hyderabad Asbestos Cement Products Ltd.'s case*[1], before Chinnappa Reddy and Punnayya, JJ. and before the Kerala High Court in *Carborandum Universal Ltd.'s case*[2], and as is not the case before us, or whether it is an additional remuneration within the meaning of the third part of section 2 (22) of the Act. If it does not fall either in the category of Part I or Part III, then only it can be said not to be wages and hence only then contribution will not be payable on the amount of bonus paid by the employer to the employees in such a scheme. If as happened in *Brathwaite and Co.'s case*[3], or in *Vazir Sultan Tobacco Co.'s case*[4], the bonus is paid at the discretion of the employer and can be withdrawn at any time without implementing it, then it would not be wages within section 2 (22)."

8. The real principle applicable can be set out as follows: The question as to whether

1. (1975) 47 F.J.R. 434.
2. (1976) 3 L.L.J. 17 : (1975) K.L.T. 842 : 49 F.J.R 361.
3. (1977(51 F.J.R. 338: (1977) A.L.T. 509 : (1978) I L.L.J. 469: (1978) Lab. I.C. 19: A.I.R. 1978 A.P. 18.
4. (1972) 2 L.L.J. 602.

1. (1976) 49 F.J.R. 365.
2. (1975) K.L.T. 842 : 49 F.J.R. 361.
3. (1968) 2 S.C.J. 858 : (1968) I S.C.R. 771 :(1968) I L.L.J .520 : A.I.R. 1968 S.C. 413.
4. (1972) 2 L.L.J. 602.

a particular amount paid constitutes 'wages' or not has to be decided with reference to the particular facts of each case. In order to fall within the scope of Part I of the definition, it must be remuneration payable to an employee under the terms of a contract of employment, express or implied. The amount payable must be capable of being demanded as a matter of right. The employer should not be in a position to withdraw from the agreement at his discretion. There is nothing preventing an agreement between the employer and the employee being traced to more than one document.

9. Even though the original contract of employment between the parties did not provide for the payment of productivity or incentive bonus in the present case, the amount became payable as a result of a memorandum of settlement entered into before the Labour Officer. It has thus all the elements of a contract of employment between the employer and the employee. This is not a case where the employer can withdraw from the agreement at his will. Thus the payment falls within the first part of the provision. In this view, it is unnecessary to see whether the payment falls within the third part of the provision.

10. Mr. M. R. Narayanaswami, the learned counsel for the respondent, drew my attention to the fact that the production scheduling was entirely at the discretion of the management. He pointed out that if the production is so scheduled as not to make the labour eligible for the payment, then it would be a case of unilateral withdrawal of the payment of such a bonus. It is not possible to accept this submission. Even in the case of such re-scheduling of production so long as the employee is in a position to earn the bonus, the amount will fall within the scope of section 2 (22) of the Act. If no bonus is paid, then there was no question of any contribution and therefore no need to consider any amount as falling within section 2 (22). He referred also to the fact that the production bonus was not payable where the shortfall in production was due to circumstances wholly traceable to the employer. Even such a provision does not have the effect of making it a unilateral offer of payment of incentive bonus which could be withdrawn at the discretion of the employer. So long as production has increased beyond the minimum fixed and so long as the employee has thus become entitled to the bonus in accordance with the terms of the agreement, then the amount paid by him will fall within the scope of section 2 (22) and would thus be 'wages'. The contention to the contrary is without force.

11. Two unreported decisions of N. S. Ramaswami, J., were brought to my notice. In *Employees' State Insurance Corporation* v. *English Electric Co. of India Ltd., Pallavaram*[1], the question was whether good attendance bonus came within the scope of the definition of 'wages' under section 2 (22). It was held that the bonus payable was part of the terms of the agreement between the management and the employees and it is not an *ex gratia* payment. This case supports the case of the appellant. In *Regional Director for Employee's State Insurance Corporation* v. *Foundry and Engineering service*[2], the employer and employee entered into an agreement under which an incentive bonus was to be paid to the employee under certain conditions. It was however specifically provided that it was open to the employer to withhold the said incentive bonus at his discretion without assigning any reasons. This case therefore fell within the scope of the case reported in *Braithwaite Co., Ltd.* v. *Employees' State Insurance Corporation*[3]. This decision is not of any assistance to the respondent as this is a case of a right to unilaterally withdraw from the scheme at the instance of the employer. The result is, the appeal is allowed. There will be no order as to costs.

S.J. —— *Appeal allowed.*

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1. C.M.A. No. 361 of 1974, dated 7th July, 1975.
2. C.M.A. No. 288 of 1973, dated 28th August, 1975.
3. (1968) 2 S.C.J. 858: (1968) 1 S.C.R. 771: A.I.R. 1968 S.C. 413.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

G. Ramasubbu Pillai and others .. *Petitioners**

v.

The Government of India, by the Under Secretary, Ministry of Home Affairs, (Grih Mantralaya), New Delhi and others .. *Respondents.*

Constitution of India (1950), Article 226—Natural justice—Freedom Fighters' Pension Scheme of 1972 — Pension granted—Withdrawn later without show cause notice—Withdrawal violative of principles of natural justice—Writ of certiorari *issued.*

The Government of India granted pension under the Freedom Fighters' Pension Scheme of 1972. All on a sudden, without any prior notice the petitioners received a communication, dated 30th November, 1976 from the Government of India, the first respondent, stating that the pension given to them might be treated as cancelled and that the amounts paid to them as pension would be recovered by taking necessary action by the State Government. The petitioners challenged the order, dated 30th November, 1976 of the first respondent by filing petitions praying for the issue of writ of *certiorari* on the ground that the cancellation violated the principles of natural justice.

Held: Admittedly, the petitioners were in receipt of the benefit under the scheme and before that benefit was withdrawn, they should be given notice of the intention to withdraw the same and they should also be given an opportunity to put forward their objections before the proposed withdrawal of the benefit was given effect to. Since no show-cause notice had been issued to the petitioners and the petitioners were not aware of the basis on which the first respondent had proceeded to cancel the pension, the order of cancellation was violative of the principles of natural justice. [*Para.* 11.]

Cases referred to:—

Union of India v. *Anglo Afghan Agencies,* (1968) 2 S.C.R. 366: (1968) 2 S.C.J. 889: A.I.R. 1968 S.C. 718; *A. K. Kraipak* v. *Union of India,* (1970) 1 S.C.J. 381: (1970) 1 S.C.R. 457: A.I.R. 1970 S.C. 150; *Keshav Mills Ltd.* v. *Union of India,* (1973) 3 S.C.R. 22: (1973) 1 S.C.C. 380: A.I.R. 1973 S.C. 389; *D. F. O., South Kheri* v. *Ram Sanehi,* A.I.R. 1973 S.C. 205; *State of Orissa* v. *Dr. (Miss) Dinapani Dei,* (1967) 2 S.C.J. 339: (1967) 2 S.C.R. 625: A. I. R. 1967 S. C. 1269; *Mohinder Singh* v. *Chief Election Commissioner,* (1978) 2 S.C.J. 441: (1978) 2 S.C.R. 272: (1978) 1 S.C.C. 405: A.I.R. 1978 S.C. 851; *Schmidt* v. *Secretary of State for Home Affairs,* (1969) 2 Ch. 149: (1969) 1 All E.R. 904.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue writ of *certiorari,* calling for the records of the first respondent in all the petitions relating to his order, dated 30th November, 1976 and made in No. 29/1/Genl./76/FF/EZ/II along with all connected records and quash the said order cancelling the Freedom Fighters' Pension in so far as the petitioner in each of the petitions is concerned.

C. R. Pattabhiraman, for *M. Kalyanasundaram* and *S. N. Gopalakrishnan,* for Petitioners.

U. N. R. Rao, Senior Central Government Standing Counsel and *N. R. Chandran,* for Government Pleader, for Respondents.

The Court made the following

ORDER.—As the point involved in all the above writ petitions is the same, they are dealt with together. The facts involved in all the matter are also substantially the same and as such it is sufficient to deal with the facts in the first case, *i.e.*, W.P. No. 197 of 1978.

2. The first respondent herein had proposed a scheme for rehabilitation of those persons

* W.P. Nos. 197 to 202, 512 to 519, 525, 1319, 1328, 2955 and 2956 of 1978.

30th January, 1979.

who participated in the National Freedom Struggle and sacrificed the prospects of all livelihood and who were actually without any means of substance. The said Scheme formulated by the Government of India is known as the Freedom Fighters' Pension Scheme of 1972. The said Scheme laid down the class of such freedom fighters who will be covered by the Scheme and also prescribed certain conditions and procedure for the applications to be made and for the grant of pension thereunder. For a person to become eligible for the grant of pension under the said Scheme, he should have suffered imprisonment of not less than six months prior to 15th August, 1947 the date on which the country attained Independence. A person claiming the benefit of pension under the Scheme has to produce the records of the jail or the criminal Courts to prove that he has in fact suffered imprisonment during the relevant period. But if such records are not available, a certificate from a co-prisoner who is either a sitting M.L.A. or M.P. or former M.L.A. or M.P. has to be produced in evidence of such imprisonment.

3. All the petitioners herein applied for the grant of pension under the said Scheme on production of co-prisoner's certificate as required under the Scheme. Their applications were considered and pension under the said Scheme was actually sanctioned by the President of India for life on various dates in 1972 and they were being paid pension from the date of sanction by the President of India. All on a sudden, without any prior notice the petitioners received a communication, dated 30th November, 1976 from the Government of India, the first respondent herein, stating that the pension given to them may be treated as cancelled and that the amounts already paid to them as pension will be recovered by taking necessary action by the State Government. Subsequently, proceedings under the Revenue Recovery Act have been initiated against the petitioners for recovery of the amounts of pension paid to them before the said order of cancellation of pension was issued. It is at that stage the petitioners have come before this Court seeking the issue of a writ of *certiorari* from this Court to quash the order of the first respondent, dated 30th November, 1976 under which the pension granted to the petitioners and others had been cancelled and a direction has been given to the State Government to recover the pension already paid by taking necessary action.

4. The contentions advanced on behalf of the petitioners are two-fold. One is that the pension to freedom fighters having been sanctioned in pursuance of the provisions of the Freedom Fighters' Pension Scheme of 1972 after scrutiny and local enquiry as regards the factum of the petitioners suffering an imprisonment for a period of six months, there is no question of the first respondent going back on the findings given at that stage and withdrawing the pension earlier granted. The second point urged is that in any event, the impugned order, dated 30th November, 1976 cancelling the pension granted to the petitioners and directing recovery of the amounts already paid is clearly violative of the principles of natural justice, in that all the petitioners herein have in fact been condemned unheard and that no show-cause notices have been given to them before the benefit of pension granted to them is withdrawn.

5. As against these contentions, the learned Central Government Standing Counsel, Mr. U. N. R. Rao, appearing for the first respondant contends that the conferment of benefit under the Scheme to the petitioners is purely *ex gratia* and, therefore, the first respondent is entitled to withdraw the benefit at any time it likes if they felt that the petitioners had been wrongly granted the benefit under the Scheme, and that the grant of pension, to all of them was only provisional subject to cancellation on further scrutiny of materials. It is next pointed out by the learned counsel for the first respondent that the impugned order is only administrative in nature and, therefore, there is no question of following the principles of natural justice before passing the same.

6. In this case to appreciate the rival contentions the provisions of the Freedom Fighters' Pension Scheme, 1972, under which the petitioners have been granted pension have to be looked into. The said Scheme came into force on 15th August, 1972. That Scheme provided for the grant of pension to living

freedom fighters, their families if they are no more alive, and to the families of martyrs. The minimum pension under the scheme is Rs. 200 per month if the freedom fighter is alive. In the case of families, it will vary from Rs. 100 to Rs. 200 per month, but not more than one member of the family can be granted pension under the said Scheme. That Scheme also covers persons who took part in the freedom struggle in the former French and Portugese territories in India and also the persons who participated in the I.N.A. movement and in the Independence League. For eligibility of this pension under the Scheme, a person should have suffered a minimum imprisonment of six months in the mainland jails before independence. However, ex-I.N.A. or ex-Military persons will be eligible for pension if the imprisonment or detention suffered by them was outside India. For the purpose of determining the minimum period of imprisonment of six months, the broken periods of imprisonment will have to be totalled up and counted as one. The procedure for claiming the benefit under the Scheme is also set out therein. As per the procedure set out, an applicant should furnish the following documents along with his application. (1) Certificates from the concerned jail authorities, District Magistrates or the State Government to the effect that the applicant has suffered imprisonment as required under the Scheme; (2) In case of non-availability of such certificates, co-prisoner certificate from a sitting M.P. or M.L.A. or from an ex.M.P. or an ex.M.L.A. specifying the jail period; (3) In the case of persons remaining underground or ex-I.N.A. person, a different certificate is required. On production of such certificates along with the applications, the applications will be scrutinised by the Government and sanction will be issued if the applications are found to be in order and the applicants are found to be entitled to the benefit of the Scheme. The Scheme also deals with the mode of payment and duration etc.

7. The petitioners in all these cases applied for pension under the said Scheme and they produced along with their applications certificates from their co-prisoners. After scrutiny of the petitioners' applications and co-prisoner certificates produced by them, the pension has been sanctioned to them after 15th August, 1972. Subsequently by the impugned order, the first respondent has chosen to cancel the order granting pension and to direct the State Government to recover the pension amounts already paid to the petitioners. No reason for cancellation has been given in the impugned order and it merely says that in view of the State Government's recommendation the pension already granted to the petitioners will stand cancelled. The impugned order does not indicate as to what is the nature of the recommendation of the State Government and what are the reasons for cancelling the pension which had already been granted to the petitioners. However, in the counter-affidavit filed on behalf of the respondents, it has been stated that the co-prisoner certificates produced by the pensioners along with their applications are found to be false and that apart from those false certificate there is no material or records to indicate that the petitioners were in fact in jail for a period of six months as contemplated by the Scheme. Though the first respondent has set out the grounds for cancellation of the pension granted to the petitioners in the counter-affidavit the petitioners were not told as to what are the materials on which the respondents came to the conclusion that the co-prisoner certificates given by them were false or that the petitioners were not in jail for the required period of six months. In these circumstances, the petitioners complain that the impugned order is vitiated for the two reasons set out above.

8. There cannot be any doubt that the grant of pension under the said scheme is not statutory. Though the petitioners have alleged in the affidavits filed in support of their writ petitions that the grant of pension is statutory, in fact no statutory basis has been suggested and no statute has been referred to by the learned counsel for the petitioners as forming the basis for the grant of pension in these cases. Therefore, the Court has necessarily to proceed on the basis that it is a non-statutory Scheme under which the petitioners have been granted pension. Learned counsel for the respondents would say that the grant of pension is not only non-

statutory, but purely *ex gratia* and, therefore, the petitioners cannot claim a right to get the pension especially when the Scheme itself contemplates the payment of pension being provisional subject to verification of the fact whether the petitioners have in fact suffered imprisonment for the relevant period. A perusal of the provisions of the Scheme indicates that the pension is sanctioned under the Scheme on scrutiny of the applications and the certificates produced by the petitioners. In these cases, the petitioners were granted pension only after scrutiny of the applications and co-prisoner certificates produced by them. Though the payment of pension is referred to as provisional, the Scheme does not set out the circumstances under which the pension could be cancelled. But the actual orders of sanction of pension by the President clearly retain the power of cancellation if it is found that the petitioners are not entitled to the grant of pension under the Scheme on a further enquiry and scrutiny of the records. Therefore, the actual orders granting pension to the petitioners and others under the said Scheme actually contain a power of revocation or cancellation.

9. The question then is whether the power of cancellation referred to in the orders sanctioning the pension has properly been invoked. It is in this connection, the contention advanced by the learned counsel for the respondents that the order of cancellation, which has been impugned in these writ petitions, is an administrative order and, therefore, the first respondent need not follow the principles of natural justice, has to be considered.

10. Mr. Pattabhiraman learned counsel for the petitioners contends that the distinction between an administrative order and a quasi-judicial order no longer exists with reference to the requirement or necessity to follow the principles of natural justice and that in fact with reference to the application of the principles of natural justice, the judicial opinion is uniform that there is practically no difference as on date between the administrative orders and quasi-judicial orders. Learned counsel in support of his submission that even in respect of administrative orders, the principles of natural justice have to be followed if the order is likely to affect the interests of the person concerned, referred to the various decisions of the Supreme Court. After considering the observations of the Supreme Court in the said decisions, I am clearly of the view that even treating the impugned order as an administrative order, the principles of natural justice should have been followed. In *Union of India* v. *Anglo-Afghan Agencies*[1], dealing with the provisions of the Export Promotion Scheme for woollen textiles and woollen goods promulgated by Central Government, the Supreme Court, after holding the Scheme to be non-statutory, expressed its view that the Court can grant relief to the person affected even though the relief is based on a non-statutory Scheme. In *A. K. Kraipak* v. *Union of India*[2], the Supreme Court had specifically pointed out that even an administrative authority is bound to follow the rules of natural justice. In that case, the Supreme Court pointed out that the dividing line between an administrative order and a quasi-judicial order is quite thin and is being gradually obliterated and that the concept of rule of law would lose its vitality if the administrative authorities are not charged with the duty of discharging their functions in a fair and just manner. In *Keshav Mills Limited* v. *Union*[3], the Supreme Court observed that the concept of natural justice cannot be put into a straight-jacket, that it is futile to look for definitions for standards of natural justice, that the only essential point that has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. In *D. F. O., South Kheri* v. *Ram Sanehi*[4], it was pointed out that an administrative order affecting the rights of a party has to be made in a manner consonant with the rules of natural justice. In that case, a contract awarded to a forest contractor by the Forest Officer was cancelled by a higher authority without any notice. When a complaint of

1. (1968) 2 S.C.J. 889 : (1968) 2 S.C.R. 366 A.I.R. 1968 S.C. 718.
2. (1970) 1 S.C.J. 381 : (1970) 1 S.C.R. 457: A.I.R. 1970 S.C. 150.
3. (1973) 3 S.C.R. 22 : (1973) 1 S.C.C. 380 A.I.R. 1973 S.C. 389
4. A.I.R. 1973 S.C. 205.

violation of the principles of natural justice was made, the Supreme Court held that the cancellation order is in violation of the principles of natural justice. The Supreme Court referred to the arguments advanced on behalf of the State that the order of cancellation of the contract was an administrative order and, therefore, the principles of natural justice need not be followed. Rejecting that contention, the Supreme Court observed:

> "Granting that the order was administrative and not quasi-judicial, the order had still to be made in a manner consonant with the rules of natural justice when it affected the respondent's rights to property. This Court in the case of *State of Orissa v. Dr. (Miss) Dinapani Dei*[1], held in dealing with an administrative order that "the rule that a party to whose prejudice the order is intended to be passed is entitled to a hearing applied alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers". The Divisional Forest Officer in the present case set aside the proceeding of a subordinate authority and passed an order which involved the respondent in considerable loss. The order involved civil consequences. Without considering whether the order of the Divisional Forest Officer was vitiated because of irrelevant considerations, the order must be set aside on the simple ground that it was passed contrary to the basic rules of natural justice".

In a recent decision in *Mohinder Singh* v. *Chief Election Commissioner*[2], the matter has been put beyond any doubt. In that case, it has been stated as follows:—

> "The dichotomy between administrative, quasi judicial functions *vis-a-vis* the doctrine of natural justice is presumably obsolescent after *A. K. Kraipak's case*[1], in India and *Schmidt* v. *Secretary of State for Home Affairs*[2], in England.
>
> The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it".

Dealing with the recent and fresh thinking on the subject of principles of natural justice, the Court observed that though natural justice involves the irritating inconvenience for men in authority, of having to hear both sides, since notice and opportunity are its very marrow and this principle is so integral to good Government, the onus is on him who urges exclusion to make out why. Their Lordships of the Supreme Court also referred to the following observation of Lord Denning in an earlier case:

> "Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking 'the Judge was biased'. Justice must be felt to be just by the community if democratic legality is to animate the rule of law. And if the invisible audience sees a man's case disposed of unheard, a chorus of 'no-confidence' will be heard to say, 'that man had no chance to defend his stance' ".

11. The above decisions of the Supreme Court clearly lay down that even administrative tribunals are bound to follow the principles of natural justice if the ultimate order to be passed by them is likely to affect the property and personal rights of the individuals. In this case, rightly or wrongly, a benefit has been conferred on the petitioners under the said Pension Scheme. On the basis of the materials produced by them, the petitioners were able to satisfy the authorities in the first instance that they are entitled to the benefit of the Scheme, and it is only after such satisfaction, they got the

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1. (1967) 2 S.C.J. 339 : (1967) 2 S.C.R. 625 : A.I.R. 1967 S.C. 1269.
2. (1978) 2 S.C.J. 441 : (1978) 2 S.C.R. 272 : (1978) 1 S.C.C. 405 : A.I.R. 1978 S.C. 851.

1. (1970) 1 S.C.J. 381 : (1970) 1 S.C.R. 457 : A.I.R. 1970 S.C. 150.
2. (1969) 2 C.H. 149 : (1969) 1 All E.R. 904.

benefit of the scheme. Before the pension so granted to the petitioners under the Scheme is withdrawn, the petitioners are entitled to know as to what are the grounds on the basis of which the pension is sought to be cancelled and the benefit given to them earlier is being withdrawn, and they are also entitled to be put on notice of the materials on the basis of which the pension earlier granted to them is being withdrawn. They are also entitled to make their representations: In this case, admittedly, no notice has been given to the petitioners prior to the impugned order of cancellation and the petitioners were not even made aware of the reasons why the pensions given to them are being withdrawn. Admittedly, the petitioners are in receipt of the benefit under the Scheme and before that benefit is withdrawn, they must be given notice of the intention to withdraw the same and they must also be given an opportunity to put forward objections before the proposed withdrawal of the benefit is given effect to. Since no show-cause notice has been issued to the petitioners and the petitioners are not aware of the basis on which the first respondent has proceeded to cancel the pension, the order of cancellation is violative of the principles of natural justice. Those rules clearly require that the petitioners should be given show-cause notice and their objections should be heard before a decision to cancel the pension already granted is taken by the first respondents. As a matter of fact, from the records produced by the learned Senior Central Government Standing Counsel, it appears that since 1976 show-cause notices are uniformly given to persons whose pensions are sought to be withdrawn and in the said show-cause notices reasons for such cancellation have been set out in detail and the persons concerned are being given opportunity to make their representations. There is no reason as to why such show-cause notices have not been given to the petitioners in this case. I therefore, feel that the impugned order is defective, in that, the cancellation of the pension granted to the petitioners had been made without any prior notice to the petitioners and, without giving any opportunity to them to put forward their objections for such withdrawal or cancellation of the pension.

12. Learned counsel for the respondents submits that the pension granted to the petitioners being an *ex gratia* payment, it can be withdrawn at any time. But so long as the payment of pension is in pursuance of the provisions of a Scheme, the cancellation cannot be arbitrary and without reference to the provisions of the Scheme. Even if the pension granted to the petitioners under the Scheme is taken to be *ex gratia*, still the first respondent is under duty to give notice to the petitioners and consider their representations before the benefit granted to them even it be *ex gratia*, is withdrawn. In fact in a case arising out of a refusal of a pension to a Canadian Police Officer obliged to resign, the Court held that the power to refuse pension could be validly exercised only after a fair hearing of the party adversely affected. Dealing with a case of *ex gratia* payment, Wade in his Administrative Law, Fourth Edition, at page 540 points out that even in cases of *ex gratia* payments, *certiorari* will lie to quash a decision of the Board refusing *ex gratia* payments if such a decision is not in accordance with the rules. It is thus clear that even if the payment of pension is considered to be *ex gratia*, still the authority, before it stops *ex gratia* payments already sanctioned or recovers the amounts paid earlier as *ex gratia*, must give notice to the persons affected and consider their representations. In any view of the matter, the respondent cannot avoid following the basic principles of natural justice before the benefits conferred on the petitioners are withdrawn. The impugned orders in so far as they have been passed without following the principles of natural justice, should be held to be bad. The writ petitions are therefore, allowed, and the impugned orders, so far as they relate to the petitioners, are set aside.

13. The first respondent is, however, at liberty to issue show-cause notices to each of the petitioners and hear the petititioners' before taking decision to cancel the pension granted to them earlier and seeking recovery of the amounts already paid. No costs.

S.J. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

M. S. Mani .. *Petitioner**

v.

K. N. Velayudham Chettiar .. *Respondent.*

Court-fees and Suits Valuation Act (VII of 1870), section 69— Suit for recovery of money — Ex parte *decree — Some amount realised in execution—Application to set aside* ex parte *decree*—Ex parte *decree set aside —Suit settled out of Court—Application for refund of court-fee paid—Rejection by trial Court — Revision — Realisation in execution —Effect—Refund ordered.*

The plaintiff filed a suit for recovery of Rs. 86,000 and odd and paid court-fee of Rs. 6,455-25. He obtained an *ex parte* decree. He filed execution and there was realisation of Rs. 19,855. However, the *ex parte* decree was set aside. After setting aside the *ex parte* decree, when the case came up for hearing, it was dismissed as settled out of Court. The plaintiff-petitioner prayed for refund of court-fee paid in accordance with section 69 of Court-fees and Suits Valuation Act. This was rejected on the ground that there has been a recovery of a sum of Rs. 19,855 in execution. On revision to the High Court,

Held: As a result of the setting aside of the *ex parte* decree, realisation in execution would lose its validity. If necessary, the petitioner might have been ordered to bring back the said amount to the credit of the suit as there can be no realisation in execution of a decree which had ceased to exist. The fact that there had been execution of the decree would be of no consequence, and after the decree was set aside the parties would be restored to the position which they occupied prior to the passing of the decree. On the facts before the High Court, the petitioner had clearly made out a case for a refund of the court-fee in accordance with the provisions of section 69 of the Act, and the refund was accordingly ordered. [*Para.* 3.]

Case referred to:—

Eswaramurthi v. *Ramakrishna*, (1974) 2 M.L.J. 137: 87 L.W. 898.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Sub-Court, Nagapattinam dated 25th September, 1975 in I.A. No. 735 of 1975 in O.S. No. 6 of 1972.

V. Ratnam, for Petitioner.

The Additional Government Pleader, for Respondent.

The Court made the following

ORDER.—This civil revision petition is to revise the order of the learned Subordinate Judge, Nagapattinam, in I.A. No. 735 of 1975 in O.S. No. 6 of 1972, dated 25th September, 1975. The plaintiff is the petitioner herein and was also the applicant in the Court below. He filed a suit against the defendant for recovery of a sum of Rs. 86,000 and odd and paid court-fee to the tune of Rs. 6,455.25 under section 22 of the Court-fees Act. He obtained an *ex parte* decree. In pursuance of the said decree, E.P. No. 67 of 1974 was filed and there was a realisation of Rs. 19,855. However, the *ex parte* decree came to be set aside by an order in I.A. No. 613 of 1974, dated 16th April, 1975. After setting aside the *ex parte* decree, when the case came up for hearing, it was dismissed as settled out of Court on 28th April, 1975. The petitioner prayed for a refund of the Court-fee paid in accordance with the provisions of section 69 of the Court-Fees and Suits Valuation Act. The Court below has held that the petitioner was not entitled to the refund of the court-fee, and that is how the civil revision petition came to be filed in this Court by the plaintiff.

2. The only question is whether the petitioner is entitled to refund of the court-fee paid under section 69 of the Act. Section 69 of the Act is as follows:

"Whenever any suit is dismissed as settled out of Court before any evidence has been

*C.R.P. No. 1612 of 1976. 9th *November*, 1978.

recorded on the merits of the claim, half the amount of all fees paid in respect of the claim or claims in the suit shall be ordered by the Court to be refunded to the parties by whom the same have been respectively paid."

There is an explanation to this provision and it is unnecessary for our present purpose to extract the same. The case of the petitioner before the Court below was, and here is, that this is a case which has been settled out of Court before evidence had been recorded on the merits of the claim as contemplated by the provision extracted above, and that therefore, he is entitled to a refund of the court-fee paid. The Court below has taken the view that as there has been a recovery of a sum of Rs. 19,855 in execution, the petitioner is not entitled to the refund under section 69. The correctness of this view is to be considered now.

3. In *Eswaramurthi* v. *Ramakrishna*[1], N. S. Ramaswami, J., considered a somewhat similar question. In that case also, there was an *ex parte* decree and before passing the *ex parte* decree, some evidence had also been recorded. After referring to certain decisions, the learned Judge observed as follows:

> "All these decisions proceed on the footing that the *ex parte* evidence should be treated as *non est* once the *ex parte* decree is set aside. I respectfully agree with that view. If the *ex parte* decree is set aside, the parties would be in the same position as they were before recording of *ex parte* evidence. If the suit is settled out of Court after the *ex parte* decree is set aside, such settlement is clearly before 'any evidence has been recorded', for, the *ex parte* evidence originally recorded had been wiped out, as it were, by the setting aside of the proceeding. When the settlement was reported there was no evidence on record. That means that section 69 of the Court-fees Act is applicable to this case and the plaintiff is entitled to refund of half the court-fee.".

The only way in which this decision is sought to be distinguished by the respondent is that there has been an execution in E.P. No. 67 of 1974, as a result of which a sum of Rs. 19,855 was recovered and that this makes a vital change so that the principle of that decision cannot be applied here. I do not consider that there is anything in principle which renders the principle of that decision inapplicable to the facts of this case. As a result of the setting aside of the *ex parte* decree, the realisation in execution would lose its validity. If necessary, the petitioner might have been ordered to bring back the said amount to the credit of the suit as there can be no realisation in execution of a decree which has ceased to exist. The fact that there has been execution of the decree would be of no consequence, and after the decree was set aside the parties would be restored to the position which they occupied prior to the passing of the decree. I consider that on the facts before this Court the petitioner has clearly made out a case for a refund of the court-fee in accordance with the provisions of section 69 of the Act, and the refund is accordingly ordered. The civil revision petition is allowed. There will be no order as to costs.

S.J. —— *Petition allowed.*

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1. (1974) 2 M.L.J. 137: 87 L.W. 898.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*T. Ramaprasada Rao, CJ. and V. Ratnam, J.*

Ramaswami Naidu ... *Appellant**

v.

M. S. Velappan and others ... *Respondents.*

Deed — Construction — Will or settlement —Important tests to be applied.

While interpreting an instrument, particularly to find out whether it is of a testamentary character, which will take effect after the lifetime of the executant or whether it is an instrument creating a vested right *in praesenti* in favour of a person, the question has to be examined with care, after looking into the substance of the document, the treatment of the subject by the settlor, the intention appearing both expressly in the instrument or by necessary implication, and avowed intention of the settlor not to revoke the settlement at any time, making it also public by registering the document, under the appropriate law of the country. Some of the important tests laid down in the decided cases appear to be;

(*i*) the nomenclature used by the settlor in styling the document.

(*ii*) the express dispositive words used which touch upon the time when the vested interest is created.

(*iii*) the reservation of the power of revocation in the instrument;

(*iv*) the effect of the reservation of a life estate in favour of the executant under the instrument;

(*v*) registration of the document under the appropriate law.

In the instant case, the document itself is styled as a settlement deed. It has been registered. The right to enjoy the properties and secure the benefits and the temple honours as trustees under it had become a *fait accompli* even during the lifetime of the executant of the document *'M'*. One other factor which has a great impact upon the facts and circumstances of this case is that the instrument is expressly made not revocable.

The accepted definition of a will is that it is an instrument whereunder a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. So far as the other condition which is also thought of while interpreting an instrument for the purpose of deciding whether it is a will or a settlement, namely, whether it is intended not to take effect until after the death of the donor, reference may be made to section 19 of the Transfer of Property Act. Though the disposition may be postponed till the lifetime of the settlor and though *prima facie* it may appear that the disposition consummates only after his death yet, such postponement not being illegal, if in a given instrument there is a present disposition and vesting of right *in praesenti* and if such a conclusion can be arrived at reasonably by reading the instrument as a whole then, a mere ambulation of interest during the lifetime of the settlor would not make it a testamentary one. [*Para.* 21.]

Held, that the document in question was a settlement and not a will.

Cases referred to:—

Sellayya Pillai v. *Devaraja Pillai,* (1972) 1 M.L.J. 297: 85 L.W. 152: A.I.R. 1972 Mad. 309; *Thakur Ishri Singh* v. *Thakur Basdeo Singh,* (1884) I.L.R. 10 Cal. 792: 11 I.A. 135; *Reference by the Collector and Superintendent of Stamps, Bombay,* (1896) I.L.R. 20 Bom. 210; *Rajammal* v. *Authiammal,* (1910) I.L.R. 33 Mad. 304: 20 M.L.J. 519; *Venkatachalam* v. *Govindasami,* (1924) 46 M.L.J. 288: 19 L.W. 434: A.I.R. 1924 Mad. 605; *Gangaraju* v. *Somanna,* A.I.R. 1927 Mad. 197; *Md. Abdul Ghani* v. *Fathir John Begum,* 43 M.L.J. 453: A.I.R. 1922 P.C. 281; *Ignatio Britt* v. *Rego,* (1933) 64 M.L.J. 650: 37

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*L.P.App. No. 113 of 1975. 19th February, 1979.

L.W. 716: A.I.R. 1933 Mad. 492; *Veerabadrayya* v. *Seethamma*, A.I.R. 1940 Mad. 236; *Thimmi Chetty* v. *Govindan* alias *Muniappa Gounder*, (1978) 91 L.W. 570.

Appeal under clause 15 of the Letters Patent against the decree of Mr. Justice Sethuraman, dated 12th September, 1975 and made in the exercise of the Ordinary Original jurisdiction of the High Court in S.A. No. 81 of 1973 preferred to the High Court against the decree of the Court of the Subordinate Judge, Madurai in A.S. No. 129 of 1972 (O.S. No. 965 of 1971 District Magistrate Court, Madurai Town).

K. Venkataswami, for Appellant.

V. Krishnan, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—This Letters Patent Appeal comes up before us, after leave has been granted by Sethuraman, J., permitting an appeal to be filed against his judgment in S.A. No. 81 of 1973. In the second appeal the learned Judge also considered an application filed by the plaintiff to amend the plaint, whereunder the plaintiff sought for possession of the suit properties. We shall reserve consideration of this part of the Judgment of the learned Judge, relating to the allowance of the application for amendment of the plaint, at a later stage.

2. The relevant facts which led to this appeal may briefly be stated. Alagiriswami Chettiar was the original owner of the suit properties. Under a will, dated 20th August, 1929 (Exhibit B-8), he bequeathed the suit properties in favour of his daughter, Kuppammal. Kuppammal, after she became the owner of the properties made a will, Exhibit B-9, dated 2nd August, 1933, in favour of her mother, Meenakshi Ammal. Meenakshi Ammal executed Exhibit A-1, dated 14th October, 1946, the terms and tenor of which are the subject-matter of this appeal. Under Exhibit A-1, Meenakshi Ammal, while styling the instrument as a "settlement deed", *inter alia,* provided that she should enjoy the properties during her lifetime and that thereafter the properties should devolve upon Velappan, the first plaintiff, in the suit for life. She also set out in detail the immediate provocation which prompted her to settle the properties on the first plaintiff, Velappan. Kuppammal, the daughter of the settlor under Exhibit A-1 brought up one Muniammal, who was the daughter of Kuppammal's co-widow and, according to Meenakshi Ammal, Kuppammal had expressed a desire that she should benefit Velappan, who had married Muniammal. It was to propitiate Kuppammal, who had bequeathed the property to her that Meenakshi Ammal purported to settle the properties on Velappan, the first plaintiff in the suit. In the course of our judgment, we shall refer to the specific recitals in Exhibit A-1, to bring out its true import and intendment. It appears that Meenakshi Ammal, just two days before her death, revoked the settlement deed, Exhibit A-1, which was not revokable as per its terms, and executed a will, Exhibit B-13, on 26th April, 1970. Under Exhibit B-13 she bequeathed the suit properties to the first defendant. The first plaintiff would aver that by virtue of the recitals in Exhibit A-1, he is entitled to the suit properties, that he was performing the charities as per the recitals in the deed, along with Meenakshi Ammal, when she was alive, thereafter by himself, that he leased out the suit lands to the second plaintiff and that because of interference by defendants 2 to 5, who alleged that they had secured a lease of the suit properties from the first defendant, the first plaintiff, impleading also the second plaintiff, has filed the present suit for a declaration of the first plaintiff's title to the suit properties and for an injunction restraining the defendants from interfering with their possession and enjoyment of the suit properties.

3. The first defendant resisted the action on the ground that Exhibit A-1 was only a sham and nominal document, that, in any event, the said instrument, though styled as a settlement, was only a will, and that as Meenakshi Ammal revoked the said will under Exhibit B-13 dated 26th April, 1970, the later will, Exhibit B-13, would prevail as the last will and testament of Meenakshi Ammal. Regarding the possession of defendants 2 to 5, the first defendant and the other defendants would contend that the suit properties had been leased out to the second defendant as well as the fifth defendant's husband,

that the fifth defendant continued in possession in that capacity on the death of her husband, that defendants 3 and 4 were the pannayals of the second defendant, that therefore the suit for injunction was not maintainable and that, even so, the suit for declaration of title in favour of the first plaintiff was not sustainable.

4. The learned District Munsif, who tried the suit, held that Exhibit A-1 was a settlement deed and not a will and that therefore Meenakshi Ammal had no capacity or right to execute Exhibit B-13, as the settlement deed, Exhibit A-1, was valid and binding and was in force, and could not be superseded by a later will, as the settlement deed was expressed to be not revokable, besides being registered. The learned District Munsif also held that the provisions in Exhibit A-1 restricting the absolute and vested interest in favour of the plaintiff could not impinge upon the other provisions in the instrument under which the first plaintiff was given an absolute right in the properties and that therefore the restrictions contained in Exhibit A-1 interfering with the absolute proprietorship of the first plaintiff in the suit properties were void. He accordingly granted a decree for declaration of title, but dismissed the suit in so far as it related to the relief of injunction, on the ground that defendants 2 to 5 were in possession of the suit properties, and that the first plaintiff had not proved such possession on the date of the action.

5. The plaintiffs preferred an appeal to the Subordinate Judge of Madurai, in so far as they were denied the relief of injunction. The first defendant filed a subsidiary appeal questioning the judgment and decree of the learned District Munsif granting a decree for declaration of title in favour of the first plaintiff.

6. The learned Subordinate Judge posed the following points for consideration:

"1. Whether the document, Exhibit A-1, is a settlement, deed or a will?

2. If Exhibit A-1 is construed as a settlement deed, whether it is valid in law?

3. Whether the will, Exhibit B-13, executed by Meenakshi Ammal in favour of the first defendant is true and valid?

4. Whether the plaintiffs, namely, the appellants in A.S. No. 129 of 1972, are entitled for the relief of permanent injunction?

5. Whether the defendants 2 to 5 are entitled for costs as claimed by them in their cross-objections in A.S. No. 129 of 1972?"

7. The learned Subordinate Judge came to the conclusion that Exhibit A-1 was a will, and, confirming the finding of the trial Court on the question of possession, set aside the judgment of the trial Court.

8. In second appeal Sethuraman, J., set aside the judgment and decree of the appellate Judge and restored that of the trial Court. He allowed the second appeal and while so doing granted leave to appeal against his judgment.

9. The main point for consideration is whether Exhibit A-1 is a will or a settlement. It is convenient at this stage to refer to the terms of Exhibit A-1. Meenakshi Ammal was aware of the difference between a will and settlement for she has referred to the two wills of Alagiriswami Chettiar and her daughter Kuppammal. She also referred to the pious wish of Kuppammal, that she (Meenakshi Ammal) should bring up her foster daughter, Muniammal, after her death. This was borne in mind by Meenakshi Ammal, when she executed Exhibit A-1. Indisputably Meenakshi Ammal became the owner of the suit properties under Exhibit B-9. But, in order to propitiate the soul of her husband and the wishes of her daughter Kuppammal, she, during her life time, charged the suit properties with the performance of certain trusts, incorporating a clause in Exhibit A-1 as to the amount to be spent towards such a dharma or trust, which she started to propitiate the souls of her husband and daughter. It is appropriate to quote from the document the following relevant portion from Exhibit A-1:

"இந்த நிலைமையில் காலஞ்சென்ற என் பர்த்தாவின் ஆத்மாவும், என் மகள் லேட் குப்பம்மாளின் ஆத்மாவும், என் ஸ்வீகார குமாரத்தி முனியம்மாளின் ஆத்மாவும், இனிமேல் என் ஆத்மாவும்

நற்கதியடையும் பொருட்டு எப்போதும் தவறாமல் குடும்ப தர்மம் அவசியம் நடத்தி வரவேண்டுமென்று சிலநாட்களாக என் மனம்பிரீதி ஏற்பட்டிருப்பதை நான் நல்ல ஸ்திதியில் இருக்கும்போதே ஒரு ஏற்பாடு செய்து தர்மத்தை நடத்துவது நலமென்று கருதி இந்த செட்டில்மெண்ட் பத்திரம் எழுதிவைக்கிறேன். அதாவது இதன் அடியில்கண்ட ரூபாய் மூவாயிரம் பெறுமான சொத்துக்களை என் ஆயுள்வரை என் சுவாதீனத்தில் வைத்து அவைகளின் வரும்படி அம்சங்களைக் கொண்டு அவைகளுக்குள்ள சர்க்கார் கிஸ்தி தரம் தீர்வை வகையறாக்களை செலுத்தியும், இதன் கீழ் கண்ட தர்மத்தை இதன் கீழ்க்கண்டிருக்கிற விவரப்படி வருடம் 1-க்கு ரூபாய் 35/- (முப்பதைந்துக்கு) குறையாமல் சிலவு செய்து தர்ம கைங்கரியத்தை தவராமல் நடத்திவர வேண்டியது. மேற்படி தர்மத்தை நான் நடத்திவருவதில் மேலே கண்ட என் ஸ்வீகார புத்திரி லேட் முனியம்மாளின் பர்த்தாவாகிய எம். எஸ். வேலப்பன் என் கூட இருந்து மேற்படி தர்மத்தை நடத்தி சன்னதியில் பரிவட்ட மரியாதை வகையறாவை மேற்படி எம்.எஸ். வேலப்பன் அடைந்துகொள்ள வேண்டியது. மீத வரும்படித் துகை வகையறாவைக் கொண்டு என் காலக்ஷேமம் நடத்த வேண்டியது.

என் ஆயுளுக்குப்பின் இதனடியில் கண்ட சொத்துக்களை மேற்படி எம். எஸ். வேலப்பன் அடைந்து யாதொரு பந்தக பராதீனத்துக்கும் உட்படுத்தாமல் மேற்படி சொத்துக்களின் வரும்படி அம்சங்களைக் கொண்டு சர்க்கார் கிஸ்தி தீர்வை வகையறாக்களை செலுத்தியும், இதில் கண்ட தர்மத்தை நான் நடத்துவது போல் எக்காலத்திலும் தவறாமல் நடத்தியும் மீதமுள்ள வரும்படி அம்சங்களை மேற்படி எம். எஸ். வேலப்பனும், மேற்படியார் இனிமேல் இரண்டாவது விவாகம் செய்து மேற்படியாருக்கு ஏற்படும் புத்திர பௌத்திர வாரிசுகளுக்கும் பாரம்பரையாய் மேலே கண்ட விவரப்படி அனுபவித்துவர வேண்டியது.

இதில் கண்ட சொத்துக்களுக்கு என் ஆயுளுக்குப் பின் மேற்படி எம். எஸ். வேலப்பனும் மேற்படியாரின் புத்திர பௌத்திர வாரிசுகளும் பாரம்பரையாய் அவரவர்கள் பேருக்கு பட்டா முதலியவைகளை மாற்றிக்கொண்டு மேற்படி சொத்துக்களின் வரும்படியிலிருந்தே சர்க்கார் கிஸ்தி தீர்வை வகையறாக்களை செலுத்தி மேற்படி சொத்துக்களை அபிவிருத்திமராமத்து சிலவுகள் செய்து வரவேண்டியது.

இதில் கண்ட சொத்துக்களை எக்காலத்திலும், நானும், எனக்குப்பின் எம். எஸ். வேலப்பனும், மேற்படியாரின் புத்திர பௌத்திர வாரிசுகளும் எவ்வித பந்தக பராதீனங்களுக்கும் உட்படுத்தக் கூடாது.

இந்த செட்டில்மெண்டு பத்திரத்தை எக்காரணத்தை கொண்டும், நான் மாற்றுவாவது, ரத்து செய்யவாவது எனக்கு அதிகாரமில்லை.

இந்த செட்டில்மெண்டு பத்திரம் இது முதல் எப்போதும் ஊர்ஜிதத்தில் இருந்து வரவேண்டியது",

10. With the background specifically referred to in Exhibit A-1, touching upon the wishes of Kuppammal, who apparently wanted to provide for her foster daughter, Muniammal, and contemporaneously some spiritual benefit to her kith and kin Meenakshi Ammal executed Exhibit A-1. She would refer to the very important provision, apart from the performance of the charity, wherein she admits that the first plaintiff was also involved in the performance of the said charity and that he, along with her, was enjoying the benefits of temple honours as such trustee even during her lifetime. Such an involvement and right given to the first plaintiff, even during the lifetime of Meenakshi Ammal, coupled with the fact that the suit properties were directed to vest in the first plaintiff and his heirs absolutely after the lifetime of Meenakshi Ammal, only with an obligation to perform the trust as delineated in Exhibit A-1, clearly gives out the unambiguous intention of Meenakshi Ammal to create a vested interest in Velappan, though it was postponed for her life, so far as the actual enjoyment of the proprietory interest was concerned.

11. Another element which has to be looked into for the purpose of interpreting the instrument is that Meenakshi Ammal, by her own voluntary statement, made it irrevocable. It is in the conspectus of such recitals that the restriction on the power of alienation of the property by Velappan, after it is vested in him, has to be considered, and its legal effect examined.

12. Mr. Venkataswami, learned counsel for the first defendant-appellant, laid stress upon the fact that, as the operative portion of the instrument appeared to take effect only after the lifetime of Meenakshi Ammal and as there was a prohibition in Exhibit A-1 itself

against Velappan and his heirs alienating the properties, the instrument should be read as a will or an instrument which was primarily of a testamentary character and that, in the absence of a disposition *in praesenti* under the same, the conclusion of the learned Judge was incorrect.

13. On the other hand, Mr. V. Krishnan, learned counsel for the respondent-plaintiffs, would urge that the later clauses in the settlement deed, restricting the absolute vested right *in praesenti* in Velappan could not conceivably be operative, and that they would be void, since the later interdict in the matter of the alienation of the property, which had been absolutely settled on Velappan even during the lifetime of the settlor, the vested interest merely being postponed during the lifetime of the settlor, was inoperative *ab initio*.

14. While interpreting an instrument, particularly to find out whether it is of a testamentary charater, which will take effect after the lifetime of the executant or whether it is an instrument creating a vested interested *in praesenti* in favour of a person, the question has to be examined with care, after looking into the substance of the document, the treatment of the subject by the settlor, the intention appearing both expressly in the instrument and by necessary implication, and the avowed intention of the settlor not to revoke the settlement at any time, making it also public by registering the document, under the appropriate law of the country. In *Sellayya Pillai* v. *Devaraya Pillai*[1], Raghavan, J., after referring to a series of decisions to wit; *Thakur Ishri Singh* v. *Thakur Basdeo Singh*[2]; *Reference by the Collector and Superintendent of Stamps, Bombay*[3]; *Rajammal* v. *Authiammal*[4]; *Venkatachalam* v. *Govindasami*[5]; *Gangaraju* v. *Somanna*[6]; *Md. Abdul Ghani* v. *Fakhir Johan Begum*[7]; *Ignatio Britt* v. *Rego*[8], and *Veerabadrayya* v. *Seethamma*[1], summarised the acceptable tests laid down in those cases, to determine whether a document is a will or a settlement. Some of the important tests laid down therein appear to be—

(*i*) the nomenclature used by the settlor in styling the document;

(*ii*) the express dispositive words used which touch upon the time when the vested interest is created;

(*iii*) reservation of the power of revocation in the instrument;

(*iv*) the effect of the reservation of a life estate in favour of the executant under the instrument;

(*v*) registration of the document under the appropriate law.

15. We may also add that it is the substance of the instrument and the generous impulses which prompted a person to execute the document, and not the form adopted, which should determine the real nature of the instrument.

16. It is convenient at this stage to consider the question whether the interdict created on the right of the first plaintiff to alienate the property is by itself sufficient to make Exhibit A-1 a testatmentary instrument. Section 19 of the Transfer of Property Act, reads as follows:—

"*Section* 19. *Vested interest*:—Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

17. A vested interest in not defeated by the death of the transferee before he obtained possession.

"*Explanation*:—An intention that an interest shall not be vested in not to be inferred merely from a provision whereby the enjoyment hereof is postponed or whereby a

1. (1972) 1 M.L.J. 297 : 85 L.W. 152 : A.I.R. 1972 Mad. 309.
2. (1884) I.L.R. 10 Cal. 792 : 11 I.A. 135.
3. (1896) I.L.R. 20 Bom. 210.
4. 20 M.L.J. 519 : (1910) I.L.R. 33 Mad. 304.
5. (1924) 46 M.L.J. 288 : 19 L.W. 434 : A.I.R. 1924 Mad. 605.
6. A.I.R. 1927 Mad. 197.
7. 43 M.L.J. 453 : (1922) I.L.R. 44 All. 301 (P.C): A.I.R. 1922 P.C. 281.
8. (1933) 64 M.L.J. 650 : 37 L.W. 716 : A.I.R. 1933 Mad. 492.

1. A.I.R. 1940 Mad. 236.

prior interest in the same property is given or reserved to some other persons, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person".

In *Thimmi Chetty* v. *Govindan* alias *Muniappa Gounder*[1], a Division Bench of this Court (to which one of us was a party) had to consider the question in a case where a vested interest was created under an instrument, whether the follow-up recitals, which militated against such vesting of absolute title, would belittle the force and legality of such entitlement. No doubt, in that case, the deed provided that on and from the date of the instrument the settlee should enjoy the property absolutely and that possession of one half of the property was also delivered over to the settlee, since the settlee was already in possession of the other half. This Court expressed the view that the terms used in a deed should be interpreted in their strict and primary acceptation and should not be viewed with reference to the secondary motives referred to by the settlor in an instrument of settlement. The Bench also reiterated the well known principle of interpretation that, when the terms of the deed were unambiguous and clear, the intention of the executant need not be searched for and that the Courts were bound to accept the primary words deployed by the donor of the executant, without any further probe into the motive for the execution of such instruments.

18. In the instant case the first plaintiff was already in charge of the properties as trustee to perform the obligations created under it and continued them after the lifetime of Meenakshi Ammal. There are also positive words whereby it was made clear that the properties should be vested in Velappan and his heirs for them to enjoy the same absolutely. The words used are:

> "வேலப்பன் அடைந்து......வேலப்பனும் மேற்படியார் இனிமேல் இரண்டாவது விவாகம் செய்து மேற்படியாருக்கு ஏற்படும் புத்திர பௌத்திர வாரிசுகளும் பாரம்பரையாய், மேலே கண்ட விவரப்படி அனுபவித்து வரவேண்டியது".

These two dispositive clauses create an interest *in praesenti*. The question is whether the postponement of such proprietory rights already vested in Velappan and his heirs, to the lifetime of Meenakshi Ammal, would make any difference. The *Explanation* to section 19 of the Transfer of Property Act, providing that a vested interest is not defeated by the death of the transferee before he obtains possession, makes the legislative intent clear that such a vested interest, merely for the reason that it becomes vested after the lifetime of the settlor, would not make it a settlement not being *in praesenti*. We are therefore unable to agree with the contention that the interest that Velappan, the first plaintiff, obtained under the instrument is not a vested one and that it could be defeated because it is postponed till after the lifetime of Meenakshi Ammal.

19. In the instant case the document itself is styled as a settlement deed. It has been registered. The right to enjoy the properties and secure the benefits and the temple honours as trustee under it have become a *fait accompli* even during the lifetime of Meenakshi Ammal. There is therefore no ambulation in the matter of the vesting of the interest in the first plaintiff by any declaration or use of words either express or implied. In a very early case, in *Rajammal* v. *Authiammal*[1], a Division Bench of this Court had to deal with the following facts. There was a deed which purported to be an agreement in form. It was a registered one. It contained no clause of revocation, but it declared that the executant's future debts would not be binding on the properties; and the deed went on to provide:

> ". . . . . after my lifetime both of you (wife and daughter-in-law) shall not only get the right due to me in the said lands, but also divide and enjoy in equal shares the income".

1. (1978) 91 L.W. 570.

1. (1910) 20 M.L.J. 519 : I.L.R. 33 Mad. 304.

The Division Bench (consisting of Sir Ralph Benson, Officiating Chief Justice and Krishnaswami Iyer, J.), held that the instrument was a settlement and not a will. While dealing with the question, the learned Judges were of the view that the use of the future tense was not a conclusive test, when the intention was otherwise clear, nor even the reservation of a life estate would render a settlement the less so. They also held that one of the invariable tests for determining the question whether an instrument is testamentary or not is to see whether it is revocable. They referred to the ancillary requirement to find out whether an instrument is a will or a settlement and expressed themselves to the effect that the form of the instrument and the fact that it was registered, though matters to be taken into account, are not in themselves conclusive as to determination of the character of the instrument.

20. The decision of the Division Bench of this Court in *Venkatachalam Chetty* v. *Govindaswami Naicker*[1], is different. There the document itself was styled as a deed of gift and it purported to dispose of a part of a house to which the donor was entitled in the following terms:

> "You (donee) shall yourself, after my lifetime, use and enjoy the two rooms ....I shall myself enjoy the rent in respect of the two rooms as long as I may be alive. You shall yourself use and enjoy after my lifetime that rent and the two rooms from son to grandson with power of sale etc. To this effect is the gift deed executed and given in respect of the aforesaid two rooms".

The learned Judges held that the document was in fact a will, as it was purely a declaration of the intention of the donor and as there was no disposal of any immediate right of possession or any immediate interest in the property. This is distinguishable from the facts of our case, because an immediate interest in the property was already given to Velappan, the first plaintiff, since he was acting as a co-trustee of the property, besides there being a recital that after the lifetime of Meenakshi Ammal the property should vest in him. We are therefore of the view that in the instant case there has been a vesting of the property on the death of the settlor and even during her lifetime an interest *in praesenti* has become vested in the first plaintiff as trustee for the performance of the obligation of the trust as set out in the instrument.

21. One other factor which has a great impact upon the facts and circumstances of this case is that the instrument is expressly made not revocable. The accepted definition of a will is that it is an instrument whereunder a person makes a disposition of his property to take effect after his decease and which is, in its own nature, ambulatory and revocable during his life. So far as the other condition which is also thought of while interpreting an instrument for the purpose of deciding whether it is a will or a settlement, namely, whether it was intended not to take effect until after the death of the donor, we have already referred to section 19 of the Transfer of Property Act. Though the disposition may be postponed till the lifetime of the settlor and though *prima facie* it may appear that the disposition consummates only after his death, yet, such postponement not being illegal, if in a given instrument such as Exhibit A-1, there is a present disposition and a vesting of right *in praesenti* and if such a conclusion can be arrived at reasonably by reading the instrument as a whole, then a mere ambulation of interest during the lifetime of the settlor would not make it a testamentary one. Above all, the instrument is a registered one. Taking all the circumstances into consideration, Sethuraman, J., was right when he said that Exhibit A-1 was a settlement and not a will. Undoubtedly Meenakshi Ammal desired that the document shall be effective from the date of the instrument. She was aware of the distinction between a will and a settlement. She caused the instrument to be registered. She would specifically impose a restriction on herself that she had no power of revocation of that instrument, and, as we have been already, even during the lifetime of Meenakshi Ammal, Velappan, the first plaintiff had secured a benefit under the instrument. For all these reasons we uphold the judgment of the learned Judge in so far as it relates to

1. (1924) 46 M.L.J. 288 : 19 L.W. 434 : A.I.R. 1924 Mad. 605.

the relief of declaration sought by the first plaintiff as owner of the properties.

22. At the second appellate stage the learned Judge allowed the application of the first plaintiff, permitting him to seek for the relief of possession of the suit properties and for the consequential reliefs arising therefrom. While doing so the learned Judge observed:

> "I think it proper to accept the petitions here directing the amendment of the plaint and restoring the suit for disposal on the question of the relief for possession in the trial Court".

What the learned Judge apparently meant was that, as the plaint had been amended at the second appellate stage and as a fuller enquiry was necessary as to the quality and quantity of the right of possession to which the first plaintiff would be entitled, he directed the restoration of the suit for disposal on the question of the relief of possession. As we have accepted the first plaintiff's title to the suit properties and as the relief of injunction was refused on the ground that the first plaintiff was not in possession of the suit properties, it appears to us that the suit has to be tried again by the trial Court on the entitlement for possession as claimed by the plaintiffs at the second appellate stage by seeking an amendment of the pleadings. As the defendants did not have an opportunity to meet this part of the claim for possession, it is necessary that a fresh trial has to be held. But as the suit is of the year 1971, we are not inclined to remand the suit for fresh trial on the same pleadings. The plaintiffs shall be granted refund of the court-fee, if any, paid by them for securing the relief. In order to render justice, the plaintiffs are given liberty to file an independent suit for securing possession from the defendants or those at present in possession of the properties, on the basis of the declaration of their title as per the judgment of this Court.

23. With these observations this Letter Patent Appeal is dismissed. But, in the circumstances, there will be no order as to costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

Ramu Nadar and others .. *Appellants**

v.

Sundararaja Iyengar and others .. *Respondents.*

Tamil Nadu Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963) — Othi by inamdar of kudiwaram rights—Suit for redemption by inamdar — Application of provisions of the Act — Effect on the right of the inamdar to seek redemption of the property othied.

The point in controversy was whether the application of the provisions of Act XXVI of 1963 will have any effect on the rights of an othidar to seek redemption of the property in question. It was common ground that the kudiwaram in the property sought to be redeemed was othied by the inamdar. This question no longer survived in view of the two Bench Divisions of the High Court reported in *Kuttachi and others* v. *Muhammed Sultan Rowther*, 1975 T.L.N.J. 451 and L.P.A. No. 1 of 1979 and there was no substance in the second appeal. The othidar can seek redemption. [*Paras.* 2, 3.]

Case referred to:—

Kuttachi and others v. *Muhammed Sultan Rowther*, (1975) T.L.N.J. 451.

Appeal against the decree of the Court of the Principal Subordinate Judge, Ramanathapuram at Madurai in Appeal Suit No. 107 of 1973 preferred against the decree of the District Munsif of Paramakudi in O.S. No. 506 of 1970.

T. R. Srinivasan and *K. Ramamurthi*, for Appellants.

P. S. Srisailam, for Respondents.

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* S.A. No. 1798 of 1975. 16th *February*, 1979.

The Court delivered the following

JUDGMENT.—Defendants 1, 3, 6, 13 and 18 are the appellants in this second appeal, which arises out of a suit for redemption instituted by one Sundararaja Iyengar, the first respondent herein, and one Soundaralakshmi, who figured as the first plaintiff in the suit and on whose death, the first respondent herein was recorded as her legal representative.

2. The only question that had been seriously raised and strenuously contended before the Courts below has lost much of its substance in view of two judgments of this Court, to which I shall refer a little later. The point in controversy is whether the application of the provisions of the Tamil Nadu tion of the provisions of the Tamil Nadu Act XXVI of 1963 will have any effect on the tion of the property in question. It is common ground that under Exhibits A-1 to A-5 the kudiwaram in the properties was othied by the inamdar which is sought to be redeemed. It was contended by the appellants that the right of redemption was lost because under the vesting section, the inamdar had lost his right, and consequently could not maintain a suit for redemption. This had been negatived by the Courts below and hence the second appeal.

3. I may point out that this question no longer survives in view of two Bench decisions of this Court reported in *Kuttachi and others* v. *Muhammed Sultan Rowther*[1], disposed of on 8th July, 1975 by a Division Bench consisting of Veeraswami, CJ., and Natarajan, J., wherein it was held that though the hypotheca is situate in a part inam village notified and taken over under the Tamil Nadu Act XXVI of 1963, still for purposes of redemption the jural relationship between the mortgagor and the mortgagee remained unaffected. In L.P.A. No. 1 of 1979 another Division Bench of this Court, consisting of Kailasam, CJ. and Balasubrahmanyan, J., took the same view though there is no reference to the judgment referred to earlier by me. On a consideration of the provisions of the Act XXVI of 1963, particularly the scope of the vesting section under section 3 (*b*) and the other related provisions for the grant of patta, the Bench observed:

"The mortgagors' suit for redemption cannot be resisted on the ground that the estate had been taken over by the Government under Act XXVI of 1963. The relationship of mortgagor and mortgagee continues and there can be no legal objection to the mortgagors redeeming the property and getting possession from the usufructuary mortgagee."

Dealing with the proceedings for the grant of patta, the Bench observed that the mere fact that patta had been either applied for or granted to the mortgagees will not in any manner affect the situation. It was further stated by the Bench that the question whether a person is entitled to redeem the property or not is totally outside the scope of the provisions of Act XXVI of 1963 and this in the view of the Bench was one good reason as to why the jural relationship should be held to have been left in tact to be dealt with by the civil Court.

4. In view of these judgments referred to, there is no substance in this second appeal, which fails and is dismissed. There will be no order as to costs.

R.S. ——— *Appeal dismissed.*

1. (1975) T.L.N.J. 451.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and V. Sethuraman, JJ.*

Stanmore Estate, Yercaud and others .. *Petitioners**

v.

The Commissioner of Labour, Madras and others .. *Respondents.*

(A) *Minimum Wages Act (XI of 1948), section 4 (1) (i) and (5)—Fixation of minimum wages in respect of tea estates and coffee estates — Government Notification* inter alia *fixing revised minimum wages, whether illegal — Alteration either upwards or downwards, whether permissible and not confined to particular direction—"Variation", "alteration", "adjustment" and "form", meaning of.*

(B) *Constitution of India (1950), Article 226.*

The instant writ petition concerned the interpretation of section 4 (1) (*i*) of the Minimum Wages Act and the Government Notification made in G.O. Ms. No. 1016, Labour and Employment in exercise of powers under sections 3 (1) (*b*) and 5 (2) of the Act, dated 18th November, 1976, *inter alia* fixing revised minimum rates of wages in respect of employment in the tea estates and coffee estates in Shevaroy and Palani Hills. After referring to the prescribing of the basic rates of wages and the rate of dearness allowance, the G.O. proceeded to state:

"The rates of dearness allowance noted above are linked to 1693 points of average consumer price index for Coimbatore Centre 1936-100 in respect of all estates other than those in Kanyakumari District. The rates of dearness allowance for tea and rubber estates in Kanyakumari District are linked to 1934 points of consumer price index for Nagercoil Centre (1930-100).

(*b*) Further adjustment of dearness allowance. Future adjustment of dearness allowance will be made at the following rates for variations in the average consumer price index for Coimbatore Centre (1936-100) from the level of 1693 points for all estates in areas other than Kanyakumari District and from 1934 points of consumer index for Nagercoil Centre (1939-100) in respect of tea and rubber estates in Kanyakumari District". The G.O. also gave the rates of variation for every unit of 5 points and directed adjustments to be made on the 1st January, 1st May and 1st September.

Section 4 (1) (*i*) of the Minimum Wages Act states:

"Any minimum rate of wages fixed or revised by the appropriate Government in respect of scheduled employments under section 3 may consist of—

(*i*) a basic rate of wages and a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct, to accord as nearly as practicable with the variations in the cost of living index number applicable to such workers (hereinafter referred to as the "cost of living allowance").

On the consumer price index going down to 1420 points the petitioners started paying the minimum wages as per the Government Notification giving effect to the adjustment as provided for in the G.O., The second respondent thereupon directed that the dearness allowance fixed in the G.O. should not be reduced even if the price-index fell below 1693 points (Coimbatore Centre) and 1934 points (Nagercoil) and that the arrears of wages may be paid to the workers immediately. The directions were issued based on a memorandum of the Commissioner of Labour, dated 21st September, 1977. The petitioners thereupon filed writs to quash the memorandum of the Commissioner of Labour.

Held: The words used in section 4 (1) (*i*), Minimum Wages Act are: "a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct; to accord as nearly as practicable with variation in the cost of living index number applicable to such workers". The words "to be adjusted" and "to accord.......with the varia-

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*W.Ps. Nos. 293, 1119, 1120 and 1254 of 1978.
28 *th September*, 1978.

tion on the cost of living index" clearly contemplate an alteration or change in general without confining the alteration or change to only one way, namely increase. The ordinary dictionary meaning of the words 'adjustment' or variation will mean an alteration or change without confining that alteration or change to only one direction. Consequently, simply as a matter of construction of the words used in the section which are simple words whose meaning is clear, the contention that the variation and adjustment contemplates only one direction, namely upwards and not downwards cannot be upheld. [*Para*. 4.]

As a matter of fact, section 4 (1) of the Act gives an option to the Government to fix or revise the minimum rate of wages in any one of the methods mentioned in that sub-section, namely clauses (*i*), (*ii*) or (*iii*). Further the statute itself contemplates two rates; a basic rate of wages and a special allowance at a rate to be adjusted. In such a context it is impossible to hold that simply because the Act was one dealing with the fixation or revision of minimum rates of wages, it has to be concluded, that the words 'adjustment' and 'variation' must be given a limited or restricted meaning connoting 'adjustment' only upwards and not downwards. A variation either upwards or downwards will have to be with reference to a fixed position, or a fixed point and that is exactly what is contemplated when the Government Notification used the words from the level of 1693 points and there is no question of the word "from" conclusively showing that the variation contemplated is only upwards and not downwards because even if the variation is to be downwards, it will be a decrease or coming down from 1693 points, and it is only a question of increase 'from' or going up from 1963 points. Therefore the use of the word 'from' does not afford any support to the contention put forward on behalf of the employees. In these circumstances the Memorandum of the Commissioner of Labour dated 21st September, 1977, is contrary to law and beyond his jurisdiction. [*Para*. 5.]

Petitions under Article 226 of the Constitution of India praying the High Court to issue a writ of *certiorari* calling for the records in ZI.4220/77-16 dated 21st September, 1977 Memorandum issued by the first respondent in all the writ petitions and quash the same in so far as it relates to the petitioner in each of the petitions.

V. Ratnam, for Petitioners.

V. Sundar Anand, for Government Pleader and *W. S. Sivasankar*, for Respondents.

The Order of the Court was made by

Ismail, J.—This batch of writ petitions raises a common question relating to the interpretation of section 4 (1) (*i*) of the Minimum Wages Act, 1948 hereinafter referred to as the Act, and the Government Notification, dated 18th November, 1976 made in G.O. Ms. No. 1016, Labour and Employment, in exercise of the powers conferred by clause (*b*) of sub-section (1) of section 3 and sub-section (2) of section 5 of the Act, *inter alia* fixing revised minimum rates of wages (*sic*) in respect of tea estates and coffee estates in Shevaroy and Palani Hills. The Government Order stated that the Government was revising the rates of wages specified in columns 2 and 3 of the Schedule in respect of the employment in question which is a scheduled employment and having prescribed the basic rate of wages and the rate of dearness allowance, the order of the Government proceeded to state—

> "The rates of dearness allowance noted above are linked to 1693 points of average consumer price index for Coimbatore Centre 1936-100 in respect of all estates other than those in Kanyakumari District. The rates of dearness allowance for tea and rubber estates in Kanyakumari district are linked to 1934 points of consumer price index for Nagercoil centre (1939-100)
>
> (*b*) Further adjustment of dearness allowance: future adjustment of dearness allowance will be made at the following rates for variations in the average consumer price index for Coimbatore centre (1936-100) from the level of 1693 points for all estates in areas other than Kanyakumari District and from 1934 points of consumer price index for Nagercoil centre (1939-100) in respect of tea and rubber estates in Kanyakumari District."

The Government Order gives the rate of variation for every unit of 5 points and states that the adjustment shall be made on the 1st January, 1st May and 1st September of each year based on the four monthly averages of the second previous four months prior to the date of revision. This Government Order is fully in accordance with the terms of the statute in section 4 (1) (*i*) which states—

> "Any minimum rate of wages fixed or revised by the appropriate Government in respect of scheduled employments under section 3 may consist of—
>
> (*i*) a basic rate of wages and a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct, to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers (hereinafter referred to as the 'cost of living allowance')."

The petitioners in these writ petitions were paying their employees the wages as prescribed by the said Government Order. The consumer price index had gone down to 1420 points, and therefore, the petitioners started paying minimum wages as per the notification giving effect to the adjustment as provided for in the Government Order. Under these circumstances, the petitioners received a communication from the Inspector of Plantations, Yercaud, the second respondent, dated 30th December, 1977 stating that the dearness allowance fixed in G.O.Ms. No. 1016, Labour and Employment, dated 18th November, 1976 should not be reduced even if the consumer price index falls below 1693 points (Coimbatore centre) and 1934 points (Nagercoil) and that the arrears of wages may be paid to the workers immediately. This instruction given by the second respondent was based upon a memorandum issued by the Commissioner of Labour, Madras, dated 21st September, 1977. The Commissioner of Labour by that memorandum pointed out that representations had been received from the Trade Unions connected with the employment in plantations and from certain Inspectors of Plantations also seeking clarification in the matter of payment of dearness allowance even if the consumer price index goes below the points at which the dearness allowance has been linked to in the notification while revising the minimum rates of wages for the employment in any plantation. The memorandum proceeded to state—

> "The Inspector of Plantations and the Labour Officers are informed that the Government have instructed that the dearness allowance notified in the G.O. Ms. No. 1016. Labour and Employment, dated 18th November, 1976 should not be reduced, even if the consumer price index falls below 1693 points (Coimbatore) and 1934 points (Nagercoil). In view of the above, the question of notification of dearness allowance periodically on the basis of the consumer price index as mentioned in the Government Order cited will not arise unless and until there is variation in the consumer price index over and above the level of 1693 points (Coimbatore) and 1934 points (Nagercoil) and then goes below that rise upto the level of 1693 points and 1934 points as stated above. Hence the planters have to pay the notified dearness allowances even if the consumer price index goes below 1693 points (Coimbatore) and 1934 points (Nagercoil) and there is no need to issue a notification by the Government in this regard."

2. The petitioners in these writ petitions pray for the issue of a writ of *certiorari* to quash the memorandum of the Commissioner of Labour, dated 21st September, 1977 referred to above.

3. According to the learned counsel for the petitioners, the memorandum of the Commissioner giving the instructions referred to above is illegal and contrary to law. The contention is that both section 4 (1) (*i*) of the Act and the order of the Government fixing the minimum rates of wages contemplate adjustment of special allowance so as to be in accord as nearly as practicable with the variation in the cost of living index number applicable to such workers and the adjustment or variation cannot be only one way, namely, by way of increase of the special allowance, but it ought to be both ways, namely either increase or decrease, depending upon the cost of living index number going up or coming down.

4. Similarly as a matter of construction of section 4 (1) (*i*) which we have already extracted and with which the Government Order already referred to is fully in accord, we have to hold that the contention of the learned counsel for the petitioners is well-founded. The words used in the statute are:

> "a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct, to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers."

We have already referred to the fact that the Government Order has fixed the rate of adjustment for every 5 points and also at what intervals the revision has to be made. The only question that falls for consideration is whether there is anything in the language of section 4 (1) (*i*) of the Act or the Government Order to hold that the adjustment and variation contemplated is only adjustment and variation upwards and not downwards. We are clearly of the opinion that the words the variation in the cost of living index' clearly contemplate an alteration or change in general without confining the alteration or change to only one way, namely, increase. The ordinary dictionary meaning of the words 'adjustment' or variation will mean an alteration or change without confining that alteration or change to only one direction. Consequently, simply as a matter of construction of the words used in the section which are simple words whose meaning is clear, we cannot uphold the contention of the Commissioner of Labour that the variation and adjustment contemplate only one direction, namely, upwards and not downwards.

5. The learned counsel for the Workers' Union which has been impleaded as a party to the writ petitions contended that since what was fixed by the Government is the minimum rates of wages, there cannot be anything below what was actually fixed by the Government as dearness allowance, and therefore there can be only an upward revision and there cannot be a downward revision. We are unable to accept this argument. As a matter of fact, section 4 (1) of the Act gives an option to the Government to fix or revise the minimum rate of wages in any one of the methods mentioned in that sub-section, namely, clauses (*i*), (*ii*) or (*iii*). Further the statute itself contemplates two rates, a basic rate of wages and a special allowance at a rate to be adjusted. In such a context it is impossible to hold that simply because the Act was one dealing with the fixation or revision of minimum rates of wages, we must conclude that the words 'adjustment' and 'variation' must be given a limited or restricted meaning connoting 'adjustment' and 'variation' only upwards and not downwards. The learned counsel further contended that the G.O. states that 'future adjustment of dearness allowance will be made at the following rates for variation in the average consumer price index for Coimbatore Centre (1936-100) from the level of 1963 points......" and stressed the word "from" occurring in the above extract for the purpose of contending that the word 'from' denotes that the variation contemplated is only upwards and not downwards. We are unable to accept this argument. A variation either upwards or downwards will have to be with reference to a fixed position or a fixed point, and that is exactly what is contemplated when the Government Notification used the words 'from the level of 1693 points' and there is no question of the word 'from' conclusively showing that the variation contemplated is only upwards and not downwards, because even if the variation it to be downwards, it will be a decrease or coming down 'from' 1963 points, and it is not only a question of increase 'from' or going up 'from' 1963 points. Therefore, the use of the word 'from' does not afford any support to the contention put forward on behalf of the employees. In these circumstances, we are clearly of the opinion that the Memorandum of the Communication of the Commisioner of Labour, dated 21st September, 1977 is contrary to law and beyond his jurisdiction and therefore, we allow these writ petitions and issue a writ of *certiorari* quashing the same.

6. We must record with regret that even though the action was taken by the second respondent only at the instance of the Commissioner of Labour and the Commissioner of Labour himself has stated in his communication that the Government had

instructed that the dearness allowance notified in G.O. Ms. No. 1016, Labour and Employment dated 18th November, 1976 should not be reduced, even if the consumer price index falls below 1693 points (Coimbatore) and 1934 points (Nagercoil), still he had not chosen to file a counter-affidavit in any of these writ petitions to make it clear to the Court on what grounds the Government instructed him as stated above and how he could support either the instructions of the Government or the memorandum issued by him. Even the records relating to the issue of the memorandum were not produced before the Court. There will be no order as to costs.

R.S. ——— *Writ petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ. and V. Ratnam, J.*

Arimuthu and others .. *Appellants**

v.

Latchoumanpoulle .. *Respondent.*

(A) *Hindu Law of former French Indian Territory—Gift to son for life with gift over to donee's unborn sons—Son proving ungrateful to donor—Revocation of gift in favour of son—Decree also obtained by donor—Effect of judgment — Donor subsequently devising property concerned to the defendants—Effect.*

(B) *Code Civil, Articles* 899 *and* 1048.

Under Article 899 "of the French Code Civil a disposition *inter vivos* or by will whereby the usufruct is given to one and the bare ownership to another is also good". Under Article 1048 "a father or mother may give the whole or part of the property, which the law permits to be freely disposed of, to one or more of their children for life, subject to a proviso that it shall revert to such child's or children's child or children, but the property cannot be tied up further". These two Articles are special provisions. Though a double gift in the sense of a gift in the first instance and a gift over to another is generally prohibited the question is whether a gift to an unborn child is a valid one. Article 1048 is the direct answer. Though the parties are Hindus, they did not cease to be French Citizens. Therefore the French Civil Code would apply to them, and if the conclusion is reached, Article 1048 of the Code would apply to them as an exception to the general doctrine of ban on double gifts. If this were so, the plaintiff would be the ultimate remainderman, entitled to the suit property as donee under the gift. Therefore the vesting of the property having thus become effective on the date when the plaintiff was born, and he having become the absolute owner of the property by reason of the gift, it follows that the donor did not have any more right over the property for him to execute a will. [*Para.* 4.]

Under Article 1048 of the Code there is an exception in the matter of the creation of double gifts, and as it is operative in the instant case, the judgment having been rendered at a time when the plaintiff was not born it would not be binding on him nor would it be effective so as to divest the vested interest in the plaintiff on the date when he was born. Even otherwise, as under Article 1048 a gift over to a grandson is valid, and as it does not affect, the rule of perpetuity either as hinted in Article 1048 whatever effect and consequences the earlier judgment might have on the gift, it will not in any way devitalise or affect the completed gift in favour of the son, the plaintiff herein, for the reason that, on the date when the plaintiff was born, he secured an indefeasible right in the suit property by virtue of the double gift made pursuant to Article 1048. [*Para.* 5.]

Cases referred to:—

Tagore's case, (1872) I. A. (Supp.) 47 (P.C.); *Raman Nadar* v. *S. Rasalamma,* (1970) 2 S.C.J. 738: (1970) 2 S.C.R. 471: A.I.R. 1970 S.C. 1759.

Appeal under clause 15 of the Letters Patent against the judgment of Maharajan, J., dated

* L.P. A. No. 119 of 1975. *6th February,* 1979.

10th December, 1974 in Special Appeal No. 279 of 1969 (Civil).

V. Narayanaswamy, for Appellants.

A. Balapazanoor, R. Gopalakrishnan and *R. Thyagarajan,* for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—This Letters Patent Appeal is directed against the judgment of Maharajan, J., in Special Appeal No. 279 of 1969 (Civil) agreeing with the Court of First Instance, Karikal, and dismissing the appeal before him. The appellants before him were, the defendants in the action. One Arunachala had six sons, one of whom was Subramania, who died and who was not a party to this action. His son, is the plaintiff in the action. Defendants 1 to 3 are the sons of the fourth defendant, and defendants 4 to 8 are the sons of Arunachala. By a gift deed, dated 27th April, 1936, Arunachala bequeathed the usufruct over the suit property to Subramania and gave the remainder to any son born to Subramania thereafter to be enjoyed by him absolute. It appears that Subramania was adopted to a different family. For reasons not very clear, Arunachala filed a suit and sought for the cancellation of the gift deed as above and impleaded therein Subramania as a party defendant. Subramania remained *ex parte,* and Arunachala therefore got a decree on 5th August, 1939 in his favour whereunder the gift deed, according to the defendants, was cancelled in every perspective which had a bearing on it. After the judgment so rendered as above, the plaintiff was born to Subramania on 29th October, 1941. The defendants' case is that Arunachala, in and by a will dated 30th December, 1960, bequeathed the suit properties to them, apparently gaining his privilege to execute such a will by reason of the concellation of the gift deed under the judgment and decree, dated 5th August, 1939. Arunachala died on 6th February, 1961, and a writ of summons was taken by the plaintiff in or about 1964 seeking for a declaration that, as remainderman under the gift deed of 27th April, 1936 he was entitled to the suit property, and that the will of Arunachala executed on 30th December, 1960, which would effectively defeat his rights secured by him under the gift deed, was void and unenforceable. The Court of first instance found, in the light of the law adopted by the Hindus residing in Pondicherry, that the cancellation of the gift deed by the judgment, dated 5th August, 1939 or the will of Arunachala dated 30th December, 1960 could not divest the vested interest secured by the plaintiff under the gift deed as above. Maharajan, J., agreed with the Court of first instance, and hence this Letters Patent Appeal.

2. Learned counsel for the appellants-defendants, would say that Arunachala did have the power to cancel the gift *in toto* so as to divest the interest of the plaintiff which he is now projecting under the same, and that, Arunachala being fortified by the judgment and decree, dated 5th August, 1939, the will, dated 30th December, 1960 becomes operative and that in this respect the judgment of Maharajan, J., ought to be interfered with. He would refer to certain privileges of the citizens of Pondicherry, who adopted as their personal law, the law of the Hindus which was obtaining in the rest of this country, and would say that a gift to an unborn son would be ineffective and that therefore the gift by Arunachala to the plaintiff, who was not born on the date when the gift was made by him as also on the date when he secured the judgment on 5th August, 1939, would not vest in him any enforceable right to enable him to file the present action. Contending contra, learned counsel for the respondent-plaintiff, would refer to some provisions of the French Civil Code, touching upon the subject-matter under discussion and would contend that the gift deed contemplates a double gift, which is permissible under the French law adopted by the Hindus and that such a double gift could only be revoked in the case of ingratitude of the donee, that, as the plaintiff was not born on the date when the judgment was secured on 5th August, 1939, the second gift to the plaintiff as the son Subramania under the gift dated 27th October, 1936 should be deemed to have remained untouched and that therefore the plaintiff's prayer for a declaration that the will of Arunachala dated 30th December,

1960 is void, is a valid request made by him in the circumstances of the case.

3. It may not be necessary for us to consider the impact of the well-known *Tagore's case*[1], in the light of the observations of the Supreme Court in *Raman Nadar* v. *S. Rasalamma*[2], referred to by counsel for the appellants. It is no doubt true that, though the Supreme Court held that there is no authority in Hindu Law to justify the doctrine that a Hindu cannot make a gift or bequest for the benefit of an unborn person, yet they were not inclined to disturb the decision of the Judicial Committee in *Tagore case*[1], which had stood the test of time. We are not pursuing this line of thought, though learned counsel for the appellants was inclined to take us through the judgment of the Supreme Court as above, for the reason that, we are here concerned with the Hindus in Pondicherry who adopted the Hindu Law as was practised in that territory. It is common ground that the French Courts functioning in Pondicherry used to refer difficult questions of Hindu Law to experts from time to time, so that the community in Pondicherry, particularly Hindus, may be benefited by such expert opinion. But this discussion need not detain us any longer, because the law which is applicable to both the plaintiff and the defendants in the instant case is the French Civil Code, which contains various articles to treat their subjects, one of which is the poser before us.

4. The main point to be considered therefore is the nature of the gift made by Arunachala on 27th April, 1936. Under Article 899, "a disposition *inter vivos* or by will whereby the usufruct is given to one and the bare ownership to another is also good". Under Article 1048 "a father or mother may give the whole or part of the property, which the law permits to be freely disposed of, to one or more of their children for life, subject to a proviso that it shall revert to such child's or children's child or children, but the property cannot be tied up further". These two Articles are special provisions. Though a double gift, in the sense a gift in the first instance and a gift over to another, is generally prohibited, the question is whether a gift to an unborn child, like the son of Subramania, is a unborn child, like the son is the direct answer. Learned counsel for the appellants fairly concedes that, if Article 1048 were to be applied to the facts of this case, then the will made by Arunachala would become inoperative. Though the parties are Hindus, they did not cease to be French citizens. Therefore the French Civil Code would apply to them, and, if we come to this conclusion, Article 1048 of the Code would apply to them as an exception to the general doctrine of ban on double gifts. If this were so, Subramania's son, namely, the plaintiff would be the ultimate remainderman, who is entitled to the suit property as donee under the gift deed of Arunachala, as the absolute owner thereof. The vesting of the property thus having become effective on the date when the plaintiff was born, namely, 29th October, 1941, and he having become the absolute owner of the suit properties by virtue of the earlier gift of Arunachala dated 27th April, 1936, it follows that Arunachala did not have any more right over the property for him to execute a will on 30th December, 1960.

5. So far as the judgment obtained by Arunachala on 5th August, 1939 is concerned, the attempt made by Arunachala to cancel the gift was on the hypothesis that Subramania did not pay back the gratitude to him. No doubt, Subramania remained *ex parte*, when Arunachala obtained the judgment on 5th August, 1939. But, as in our view under Article 1048 there is an exception in the matter of the creation of double gifts, and as it is operative in the instant case, the judgment having been rendered at a time when the plaintiff was not born it would not be binding on him, nor would it be effective so as to divest the vested interest in the plaintiff on the date when he was born on 29th October, 1941. It is not disputed by learned counsel for the appellants in this case that the donor can secure a judgment and decree so as to cancel a gift, only in a case where the donee is guilty of ingratitude. But, as the plaintiff was not even born on the date when the judgment was obtained, it is in-

1. (1872) I. A. (Supp.) 47 (P.C.).
2. (1970) 2 S.C.J. 738 : (1970) 2 S.C.R. 471 : A.I.R. 1970 S.C. 1759.

conceivable to think of any act of ingratitude by an unborn person. Even otherwise as under Article 1048 a gift over to a grandson is valid, and as it does not affect the rule of perpetuity either, as hinted in Article 1048, we are of the view that, whatever effect and consequences judgment of 5th August, 1939 might have on the gift in favour of Subramania, it would not in any way devitalise or affect the completed gift in favour of the son, namely, the plaintiff herein, for the reason that, on the date when the plaintiff was born, he secured an indefeasible right in the suit property by virtue of the double gift made pursuant to Article 1048.

6. For the reasons stated above, we agree with the conclusion of Maharajan, J. The Letters Patent Appeal fails and is accordingly dismissed. There will be no order as to costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan and A. Varadarajan, JJ.*

A. K. A. CT. V. CT. Meenakshisundaram Chettiar .. *Petitioner**

v.

A. K. A. CT. V. CT. Venkatachalam Chettiar .. *Respondent.*

(A) *Tamil Nadu Court-fees and Suits Valuation Act* (*XIV of* 1955), *section* 35 (1)—*Suit for rendition of accounts of all transactions made by the defendant as plaintiff's agent—Suit valued at Rs.* 12,000 *tentatively for court-fee and jurisdiction—Objection by defendant regarding valuation of the suit and payment of court-fee—Suit dismissed by the trial Court, the valuation however of the suit and the court-fee paid being held correct and proper—Appeal by plaintiff — Petition to amend plaint on the question of valuation—Petition for amendment filed under section* 151, *Civil Procedure Code—Amendment whether can be allowed.*

(B) *Civil Procedure Code* (*V of* 1908), *Order* 6, *rule* 17 *and section* 151—*Petition for Amendment of plaint by resorting to section* 151, *not maintainable.*

The petitioner-plaintiff in the present case is, no doubt, not seeking by the amendment to put forward a new or inconsistent cause of action and there is no case of depriving the respondent-defendant by the amendment of any right which might have accrued to him under the law of limitation. But the petitioner has to satisfy the requirements of Order 6, rule 17 of the Code of Civil Procedure, before he could be allowed to make the amendment in the plaint. In the affidavit filed in support of the petition for amendment, the petitioner, after referring to what had happened in the trial Court regarding the question of court-fee paid on the plaint and what was submitted before on the question of the sufficiency of court-fee

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* C.M.P. No. 11929 of 1978 in App. No. 408 of 1972. 22nd December, 1978.

paid during the hearing of the appeal and after setting out the amendments prayed for, has stated that the proposed amendments do not in any manner change the complexion of the suit or the cause of action, that the respondent will not in any way be prejudiced by the amendments being allowed, that the amendments would not cause any prejudice to the revenue as the petitioner will be bound to pay the court-fee in the trial Court on the amount that may ultimately be ascertained as due to him from the respondent and that the petitioner may, therefore, be permitted to amend the plaint as prayed for. The petitioner has not given any explanation for making the statements in the plaint which are now sought to be omitted, or how the amendments are necessary for the purpose of determining the real questions in controversy between the parties. The petitioner will not be entitled to have the plaint amended by merely alleging that the amendment will not cause any prejudice to the respondent or the revenue. It is clear that the amendment has been prayed for only to make it appear that the court-fee already paid on the relief claimed is sufficient without at the same time giving up any portion of the relief claimed in the plaint. In these circumstances, it is not open for the petitioner to have the amendments made in the plaint. [*Paras.* 17, 18.]

Cases referred to:—

Manohar Lal Chopra v. *Rai Bahadur Rao Raja Seth Hiralal,* (1962) 1 S.C.R. (Supp.) 450: A.I.R. 1962 S.C. 527; *Arjun Singh* v. *Mohindra Kumar,* (1964) 5 S.C.R. 946: A.I.R. 1964 S.C. 993; *Ramkarandas Radhavallabh* v. *Bhagwandas Dwarakadas,* (1965) 2 S.C.R. 186: A.I.R. 1965 S. C. 1144; *Venkatanandam,* In re, 64 M.L.J. 122: 141 I. C. 602: 37 L. W. 106: 56 Mad. 705: A.I.R. 1933 Mad. 330; *Faizullah Khan* v. *Mauladad Khan,* 57 M.L.J. 281: 117 I.C. 493: 30 L.W. 104: A.I.R. 1929 P.C. 147; *Ganesh Prasad* v. *Narendra Nath,* A.I.R. 1953 S.C. 431; *Sathappa Chettiar* v. *Ramanathan Chettiar,* (1955) 2 M.L.J. 408: 68 L.W. 659: I.L.R. (1956) Mad. 341: A.I.R. 1955 Mad. 682; *Ramayya* v. *Ramaswami,* (1922) 24 M.L.J. 233: 18 I.C. 363; *Arunachalam Chetty* v. *Rangaswami Pillai,* 28 M.L.J. 118: I.L.R. 38 922: 28 I.C. 79; *Narayana* v. *Periappan,* I.L.R. (1938) Mad. 1031: (1938) 2 M.L.J. 557: 48 L.W. 454: 178 I.C. 159: A.I.R. 1938 Mad. 887; *Ganesh Trading Company* v. *Moji Ram,* (1978) 2 S.C.J. 98: (1978) 2 S.C.R. 614: (1978) 2 S.C.C. 91: A. I. R. 1978 S.C. 484; *Sathappa Chettiar* v. *Ramanathan Chettiar,* 1958 S.C.J. 407: (1958) 1 An. W. R. (S.C.) 148: (1958) 1 M.L.J. (S.C.) 148: 1958 S.C.R. 1021: A.I.R. 1958 S.C. 245.

Petition presented to order an amendment of the Plaint in O.S. No. 83 of 1969 on the file of the Court of the Subordinate Judge, Devakottai as follows:—

(*a*) In paragraph 8 of the Plaint the last three words namely "and nothing more" may be omitted;

(*b*) In paragraph 9, the following words at the end of the para "and pay the plaintiff the amounts that are still with him less the amount already paid" may be mentioned;

(*c*) In paragraph 12, the words occurring after the second sentence in the para "much more will be due" may be omitted;

R. Kesava Ayengar, for *D. Peter Francis* and *B. G. Umakanthan,* for Petitioner.

M. R. Narayanaswami and *K. Subramanian,* for Respondent.

The Order of the Court was delivered by

Varadarajan, J.—This petition under Order 6, rule 17 read with section 151 of the Code of Civil Procedure is by the Appellant for amendment of the plaint by omitting the words (1) "and nothing more" occurring in paragraph 8; (2) "and pay the plaintiff the amounts that are still with him" less the amounts already paid" occurring in paragraph 9; and (3) "much more will be due" occurring in paragraph 12 of the plaint.

2. The petitioner's suit before the Sub-Court, Devakkottai was for directing the respondent-defendant to render account of all the transactions made by the defendant as the plaintiff's agent from 22nd January, 1965 and also for all the amounts received by the defendant on the plaintiff's behalf as his agent including the amount received from one Alagappa and to pay the petitioner whatever may be found to be due to him. According to the plaint the plaintiff, the defendant and their two brothers Alagappa and Annamalai were partners of A. K. A. CT. V. Firm carrying on business at Kula

Lumpur each of them having one-fourth share. On 22nd January, 1965 the plaintiff executed a general power of attorney at Karaikudi in Tamil Nadu authorising the defendant to transact all his business, sell his properties and receive the sale price and other monies etc. The plaintiff and the defendant have retired from the partnership on 27th March, 1965 leaving their other two brothers, Alagappa and Annamalai to carry on the business, in consideration of Alagappa paying the plaintiff and the defendant 6,50,000 dollars each equivalent to Rs. 16,12,000 at Rs. 248 per 100 dollars for taking their shares and all the assets in the firm. The defendant received from Alagappa as the plaintiff's agent a sum of 6,50,000 dollars equivalent to Rs. 16,12,000 on or about 13th April, 1965 and remitted to the plaintiff at Kottaiyur four sums, namely Rs. 25,000 on 25th October, 1965, Rs. 1,30,750 on 7th February, 1966 and Rs. 25,311-65 on 7th February, 1966 and Rs. 4,56,340 on 11th August, 1967 aggregating to Rs. 6,37,401.65 "and nothing more". The defendant is bound to render an account of the monies received from Alagappa and pay the plaintiff the amounts that are still with him "less the amounts paid".

3. The plaintiff has valued the suit for court-fee and jurisdiction tentatively at Rs. 12,000 under section 35 (1) of the Court-fees Act XIV of 1955 and paid a court-fee of Rs. 900.50, and added in paragraph 12 of the plaint that much "more will be due" and that if on taking accounts more is found due by the defendant, he will pay the court-fee on the excess found due to him.

4. The defendant has contended, *inter alia*, in his written statement that the suit is not properly valued and proper court-fee has not been paid.

5. The learned Subordinate Judge dismissed the suit with costs on 13th December, 1971 holding that the plaintiff is not entitled to the relief of accounting prayed for. On issue 6 relating to valuation and court-fee, he had given a finding on 21st January, 1971 that the valuation and court-fee paid are proper. In that finding he has observed:—

"We cannot expect the plaintiff to know what amount the defendant received on his behalf even though it is admitted by the parties that the share of the plaintiff's assets in the firm was valued at Rs. 6,50,000 dollars and taken over by his elder brother Alagappa Chettiar. In these circumstances the plaintiff has filed the suit as one for rendition of accounts and valued the same at Rs. 12,000. As the plaintiff cannot be expected to know the amount received by the defendant on his behalf, the frame of the suit and its valuation for the purpose of court-fee and jurisdiction cannot be said to be wrong. So I hold that the plaint has been properly valued and proper court-fee has been paid".

When arguments in the appeal were advanced it was submitted by the learned counsel for the respondent by way of assisting the Court that though under clause (1) of section 35 of the Court-fees Act, 1955 in a suit for accounts fee has to be computed on the amount sued for as estimated in the plaint and clause (2) of that section lays down that where the amount payable to the plaintiff as ascertained in the suit is in excess of the amount as estimated in the plaint, no decree directing payment of that amount as so ascertained shall be passed until the "difference between the fee actually paid and the fee that would have been payable had the suit comprised the whole of the amount so ascertained is paid, and if the additional fee is not paid within such time as the Court may fix the decree shall be limited to the amount to which the fee paid already extends and the estimate must be an honest estimate and it must approximate to the amount alleged to be due, and should not be widely discrepant with the amount alleged in the plaint to be due. It was further submitted that though no revision has been filed against the finding of the learned Subordinate Judge on the issue relating to court-fee, under section 12 (4) of the Court-fees Act, 1955, it is lawful for the Court hearing the appeal, either of its own motion or on the application of any of the parties, to consider the correctness of any order passed by the lower Court affecting the fee payable on the plaint or in any other proceeding in the lower Court and determine the proper fee payable thereon. On facts it was submitted that the allegation in the plaint is that the defendant, as the plain-

tiff's agent, has received from Alagappa a sum of 6,50,000 dollars equivalent to Rs. 16,12,000 and has remitted to the plaintiff only four sums aggregating to Rs. 6,37,401.65 during the period from 25th October, 1965 to 11th August, 1967 and nothing more and therefore according to the plaint a sum of Rs. 9 lakhs odd is due to the plaintiff, and therefore the estimate in the plaint at Rs. 12,000 is not an honest estimate and court-fee should be paid on the amount approximating to the amount alleged to be due. On the other hand it was contended on behalf of the appellant that the defendant has no *locus standi* to question the correctness of the trial Court's finding on the question of court-fee and that the court-fee paid is in accordance with section 35 (1) of the Court-fees Act. Orders were reserved by us on the question of court-fee.

6. Subsequently the petition for amendment of the plaint has been filed without prejudice to the submissions already made on behalf of the plaintiff-appellant on the question of valuation. In the petitioner's affidavit filed in support of the petition, it is alleged that the object of the defendant is only to coerce the petitioner to terms by resort to technical pleas and dilatory tactics, and it is prayed that the petitioner may be permitted to amend the plaint as stated above. It is further stated that the proposed amendment does not in any manner change the complexion of the suit or the cause of action, that the respondent will in no way be prejudiced by the amendment being allowed, and that the amendment will not cause any prejudice even to the revenue in that the petitioner will be bound to pay the court-fee in the trial Court on the amount which will be ultimately ascertained as due to the petitioner from the respondent-defendant.

7. The petition is opposed. It is contended in the counter-affidavit of the respondent that the petition is thoroughly lacking in *bona fides* and amounts to abuse of the process of the Court and intended to circumvent the provisions of law contained in the Court-fees Act, 1965 under the apprehension that this Court is likely to hold that the relief has not been properly valued. It is further contended that even if the amendment prayed for is allowed, it would be clear from the remaining allegations in the plaint that the value given in paragraph 12 of the plaint is not the correct value and therefore whatever was submitted by the respondent's counsel in the course of his submission on the question of court-fee and valuation will still hold good, and that in any case the petition is belated and liable to be dismissed on that ground also.

8. In the reply affidavit of the petitioner it is denied that the petition is lacking in *bona fides* and it is contended that the respondent's objection to the valuation is belated and lacking in *bona fides*. It is denied that there is any delay in coming forward with the petition for amendment of the plaint and it is contended that the petition has been filed at the earliest point of time and that the respondent having understood that he has no case on merits, is adopting dilatory tactics and raising technical pleas to postpone the decision in the appeal.

9. This petition has been filed under Order 6, rule 17 read with section 151 of the Code of Civil Procedure. It is contended on behalf of the respondent that when Order 6, relates to pleadings generally and rule 17 of that order to amendment of pleadings, it is not open to the petitioner to apply for amendment of the plaint by resorting to section 151 of the Code of Civil Procedure which reads:—

> "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".

Order 6, rule 17 reads:—

> "The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be necessary for the purpose of determining the real question on controversy between the parties".

10. In support of the contention that section 151 also can be resorted to, reliance has been placed by the learned counsel for the petitioner on the decision of the Supreme Court

in *Manohar Lal Chopra* v. *Rai Bahadur Rao Raja Seth Hiralal*[1]. In that case, the respondent before the Supreme Court, applied under section 151, Code of Civil Procedure, to the Court at Indore for restraining the appellant from continuing the proceedings in the suit filed by him in the Court at Asansol. He alleged that the appellant filed the suit at Asansol in order to put him to trouble, heavy expenses and loss of time and that he was taking steps for the continuance of the suit filed in the Court at Asansol. The submission was that the Court cannot exercise its inherent powers when there were specific provisions in the Code of Civil Procedure for the issue of interim injunction in section 94 and Order 39; There was difference of opinion between the High Courts on the point. One view was that a Court cannot issue an order of temporary injunction if the circumstances do not fall within the provisions of Order 39 of the Code of Civil Procedure. The other view was that a Court can issue a temporary injunction under circumstances which are not covered by Order 39 of the Code of Civil Procedure, if the Court is of opinion that the interests of justice require the issue of the same. The Supreme Court held, Shah, J., as he then was dissenting, that section 151 "itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent powers by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court. It is a power inherent the Court by virtue of its duty to do justice between the parties before it". Earlier, in the same judgment, the Court has observed:—

> "No party has a right to insist on the Court's exercising its jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so...... the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in section 151 itself. But these powers are not to be exercised, when their exercise may be in conflict with what was expressly provided in the Code or against the intentions of the Legislature. The restriction for practical purposes on the exercise of these powers is not because these powers are controlled by the provisions of the Code, but because it should be presumed that the procedure specially provided by the Legislature for orders in certain circumstances is dictated by the interests of justice".

Shah, J., in his dissenting judgment observed:—

> "The powers of Courts other than chartered High Courts in the exercise of their ordinary original civil jurisdiction to issue temporary injunctions are defined by the terms of section 94 (1) (*c*) and Order 39, Code of Civil Procedure. A temporary injunction may issue if it so prescribed by Rules in the Code. The provisions relating to the issue of temporary injunctions are to be found in Order 39, rules 1 and 2; a temporary injunction may be issued only in those cases which come strictly within those Rules, and normally the civil Courts have no power to issue injunctions by transgressing the limits prescribed by the rules........the power of the civil Courts other than Chartered High Courts must be found within section 94 and Order 39, rules 1 and 2 of the Civil Procedure Code".

11. On the other hand, reliance was placed on behalf of the respondent in support of the contention that amendment of pleadings cannot be made under section 151, if the case does not fall within the special provisions of Order 6, rule 17 of the Code of Civil Procedure on the subsequent decisions of the Supreme Court. The first of those decisions is *Arjun Singh* v. *Mohindra Kumar and others*[1]. There, it has been observed:—

1. (1962) 1 S.C.R. (Supp.) 450; A.I.R. 1962 S.C 527.

1. (1964) 5 S.C.R. 946; A.I.R. 1964 S.C. 993.

'It is common ground that the inherent power of the Court cannot override the express provisions of law. In ther words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necesary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates.... if this provision has been made for every contingency, it stands to reason that there is no scope for the invocation of the inherent powers of the Court to make an order necessary for the ends of justice".

In the second decision *Ramkarandas Radhavallabh* v. *Bhagwandas Dwarkadas*[1]. it has been observed:—

"It has been observed by this Court in *Manohar Lal* v. *Seth Hiralal*[2], 'the inherent powers are to be exercised by the Court in very exceptional circumstances, for which the Code lays down no procedure'. This is a well recognised principle. Rule 4 of Order 37 expressly gives power to a Court to set aside a decree passed under the provisions of that Order. Express provision is thus made for setting aside a decree passed under Order 37 and hence if a case does not come within the provisions of that Rule, there is no scope to resort to section 151 for setting aside such a decree. We, therefore, agree with the High Court that the appellate Bench of the Court of Small Causes was in error in setting aside the *ex parte* decree in exercise of powers under section 151".

It would appear from the aforesaid later decisions of the Supreme Court that the dissenting view of Shah, J., as he then was, expresed in *Manohar Lal* v. *Seth Hiralal*[2], referred to above, has come to be accepted by the Supreme Court. Therefore, it is not possible to agree with the learned counsel for the petitioner that resort can be had to section 151 of the Code if a case is not covered by Order 6, rule 17 of the Code for amendment of the plaint. We agree with the learned counsel for the respondent and hold that resort cannot be had to section 151 where the case is not covered by the specific provisions made in Order 6, rule 17 of the Code for amendment of the pleadings. Rule 17 is in Order 6 dealing with pleadings generally.

12. Learned counsel for the petitioner invited our attention to some decisions which are more relevant to the question of the court-fee payable on the relief claimed in the plaint rather than to the question of amendment prayed for in this petition. In In re, *Venkatanandam*[1], decided by a Division Bench of this Court, presided over by Ramesam and Mockett, JJ., the suit was filed for dissolution of partnership, settlement of accounts and recovery of such amounts as may be due to the plaintiffs. The plaintiffs valued the suit under section 7 (*iv*) (*f*) of the Court-fees Act, 1870 at Rs. 7,500. A decree was passed directing defendants 3 to 5 to pay certain sums of money with interest at 6 per cent. per annum from 1st April, 1924. In the memorandum of appeal filed by defendants 3 to 5 the valuation was at Rs. 12,770 and odd and the court-fee payable was said to be Rs. 847 and odd but a court-fee of only Rs. 447 and odd was actually paid on the ground that the appellants did not have enough money and the idea was to pay the deficit court-fee afterwards. In the affidavit filed on behalf of the appellants, it was stated that the valuation was made at Rs. 12,770 and odd according to the old practice. The office did not return the memorandum of grounds for supplying the deficit court-fee. Subsequently, the appellants put in a petition to revise the valuation in such a way that the court-fee paid would be adequate until the hearing of the appeal, namely at

1. (1965) 2 S.C.R. 186: A.I.R. 1965 S.C. 1144.
2. (1962) 1 S.C.R. (Supp.) 450: A.I.R. 1962 S.C. 527.

1. 64 M.L.J. 122: 141 I.C. 602 : 37 L.W. 106: 56 Mad. 705: A.I.R. 1933 Mad. 330.

Rs. 5,500. The learned Judges have observed:—

> "If the only valuation which is possible for the appeal is Rs. 12,700 then of course, he cannot do this. But it is contended on the footing of the Privy Council decision in *Faizullah Khan* v. *Mouladad Khan*[1], that even in an appeal relating to the accounts of a partnership a tentative valuation can be given by the appellant under section 7 (*iv*) (*f*), Court-fees Act. In that case, the plaintiff filed a suit on a valuation of Rs. 3,000, but the first Court gave a decree against him for Rs. 19,991. The plaintiff filed an appeal in which he paid court-fees on the said sum of Rs. 19,991. But in the memorandum of appeal, he prayed that the decree against him should not only be vacated but that he should also get a decree for Rs. 3,000. The Privy Council held that the amount actually paid is good enough for covering both the reliefs. In the Judgment, Lord Shaw said:
>
> "Their Lordships find no reason for treating that payment either as upon an under value or a split value. Their Lordships think, with respect to the Judicial Commissioner, that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellants. That amount, as already stated, may not be only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3,000 on the other".
>
> The view apparently, taken by their Lordships is that the appellant can pay court-fee on a notional valuation as in the first Court. Even if some of the sums in respect of which he was appealing are definite amounts, the actual court-fee he pays should be supposed to cover any actual sums decreed and any uncertain sums in respect of which relief is sought,.......... According to the view of the Privy Council the appellant whether plaintiff or defendant, can give some valuation and one cannot complain that the amount in the memorandum is not the proper amount, the reason being that in suits for accounts it is impossible to say at the outset what exact amount the plaintiff will recover, and they apply this principle to appeals also".

It was argued on behalf of the petitioner by the learned counsel that this decision would show that the petitioner can give any valuation in the plaint and one cannot complain that the amount is not a proper amount. A similar argument advanced on the question of the sufficiency of the court-fee paid, would be considered separately in the order to be made on the question of court-fee.

13. The next decision relied upon by the learned counsel for the petitioner is of the Supreme Court in *Ganesh Prasad* v. *Narendra Nath*[1]. In that case, it was argued that after the Subordinate Judge passed the decree in favour of the appellants, the respondent filed the appeal before the High Court without the necessary court-fees stamp. On the appellants' objection, the matter was discussed before the Registrar who held that *ad valorem* court-fee must be paid on the appeal. The prayer in the memorandum of appeal as it stood then was: "The appeal be allowed and the plaintiffs' suit be dismissed with costs throughout". In view of that order of the Registrar, the respondents prayed for amendment of their prayer by adding the following words "except delivery of possession of schedules K, Kha, Ga, except lot No. 7 of the properties mentioned in the plaint. The Division Bench of the High Court permitted the amendment at the appellants' risk. The matter came thereafter again before the Registrar who while doubting the prudence of the respondents in making the amendment, held that as the appeal memo. stood, court-fee was properly paid on the footing that the decree under appeal was only a declaratory decree. When the appeal came up for hearing, the question of maintainability was argued as a preliminary objection and the High Court upheld the

1. 57 M.L.J. 281: 117 I.C, 493: 30 L.W. 104: A.I.R. 1929 P.C. 147.

1. A.I.R. 1953 S.C. 431.

objection, but allowed the respondents (appellants before the High Court) to delete the amendment made and gave them time to pay the requisite court-fee. The argument advanced before the Supreme Court that the order of the High Court was wrong particularly because it took away the valuable right of the appellants to plead the bar of limitation if the appeal was treated as filed on the day the requisite court-fee was paid in the High Court, was repelled by the learned Judges. The Supreme Court has observed:—

"The contention therefore that by allowing the amendment, the High Court took away the present appellants' valuable right to plead the bar of limitation cannot be accepted. It was a matter of discretion for the High Court and the materials put before us indicate no reason to hold that the discretion was exercised so as to violate any recognised principles of law or that by granting leave to amend any gross injustice has been done. As pointed out by the High Court, the payment of court-fees is a matter primarily between the Government and the present respondents and that was the whole fight in respect of this contention".

On the basis of this decision, it was contended on behalf of the petitioner-plaintiff that the question of valuation of the relief and the sufficiency of the court-fee paid could not be questioned. Such an argument advanced on the question of the sufficiency of the court-fee already paid would be considered in the order to be passed about the court-fee.

14. The third decision brought to our notice by the learned counsel for the petitioner is of a Bench of this Court consisting of Rajagopalan and Balakrishna Iyer, JJ., in *Sathappa Chettiar* v. *Ramanathan Chettiar*[1]. In that suit which was for partition and accounting the plaintiff valued the suit for purposes of jurisdiction at Rs. 15,00.000 and the relief of accounting at Rs. 10,000 and paid court-fee under Article 17-B of Schedule II, Court-fees Act, 1870, without separately valuing the claim to a half share in the properties. The High Court decided on 28th April, 1954 that court-fee should be paid on the memorandum of appeal, not under Article 17-B, Schedule II, but under section 7 (*iv*) (*b*) and directed the plaintiff to value the relief claimed in the memorandum of appeal on that basis. The plaintiff thereupon valued the relief he claimed in the properties at Rs. 50,000. When objection was taken to the valuation, he filed a petition to amend the plaint by substituting the figure Rs. 50,000 for the figure Rs. 15,00,000 as the valuation for purposes of jurisdiction. The learned Judges were of the opinion that the amendment should not be allowed. They observed:

"In *Ramayya* v. *Ramaswami*[1], a Full Bench of this Court laid down that the Court could not reject the valuation made by the plaintiff in a suit under section 7 (*iv*) even if such valuation was proved to be not *bona fide* but an arbitrary valuation. These principles were reaffirmed by two other Full Benches in *Arunachalam Chetty* v. *Rangaswami Pillai*[2] and *Narayana* v. *Periappan*[3]........ In *Narayana* v. *Periappan*[3], the learned Chief Justice laid down:

"In our opinion the scheme of the Act in this respect is to allow a plaintiff to value his relief at the figure he chooses, but it does not allow him to change that valuation. He is allowed to value for the purpose of the litigation and when he has done so his valuation governs the forum of trial and of appeal. There is no objection to an appellant abandoning on appeal a portion of the relief claimed in the lower Court or saying that he does not claim relief beyond the figure corresponding to the value of the stamp, but unless he does this we are of opinion that he is bound by the valuation fixed by himself at the commencement of the litigation........ whether he could have in the circumstances

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1. (1955) 2 M.L.J. 408: 68 L.W. 659: I.L.R. (1956) Mad. 341: A.I.R. 1955 Mad. 682.

1. (1922) 24 M.L.J. 233: 18 I.C. 363.
2. 28 M.L.J. 118: I.L.R. 38 Mad. 922: 28 I.C. 79.
3. (1938) 2 M.L.J. 557: 48 L.W. 454: 178 I.C. 159: I.L.R. (1938) Mad. 1031: A.I.R. 1938 Mad. 887.

of the case furnished an arbitrary valuation for the purpose of court-fee wholly unrelated to the itemised valuation he gave for purposes of jurisdiction with reference to the real value of the properties, does not really arise for consideration........ Since as we have already pointed out, the valuation for the purpose of court-fee payable on the memorandum of appeal in such a case as this could not differ from the valuation of the plaint for the purpose of court-fee, we have to hold that the plaintiff should value the relief that falls in this case under section 7 (*iv*) (*b*) of the Court-fees Act at Rs. 15 lakhs".

In this view, the learned Judges held under section 12 (2) of the Court-fees Act, 1870, that deficit court-fee computed under section 7 (*iv*) (*b*) of the Court-fees Act, on the valuation of Rs. 15 lakhs furnished by the plaintiff himself should be paid by the date specified by them.

15. But the Supreme Court has taken a different view in the matter, when it came up before them in *Sathappa Chettiar* v. *Ramanathan Chettiar*[1]. There it has been observed:—

"The question which still remains to be considered is whether the Division Bench was justified in directing the appellant to pay court-fees both on the plaint and on the memorandum of appeal on the basis of the valuation for Rs. 15,00,000. In our opinion, the appellant is justified in contending that this order is erroneous in law. Section 7, sub-section (*iv*) (*b*) deals with suits to enforce the right to share in any property on the ground that it is joint family property and the amount of fees payable on plaints in such suits is "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal". Section 7 further provides that in all suits falling under section 7 (*vi*) the plaintiff shall state the amount of which the value of the relief is sought. If the scheme laid down for the computation of fees payable in suits covered by the several sub-sections of section 7 is considered, it would be clear that, in respect of suits falling under sub-section (*iv*), a departure has been made and liberty has been given to the plaintiff to value his claim for the purposes of court-fess ....In other words, so far as suits falling under section 7, sub-section (*iv*) of the Act are concerned, section 8 of the Suits Valuation Act provides that the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction shall be the same. There can be little doubt that the effect of the provisions of section 8 is to make the value for the purpose of jurisdiction dependent upon the value as determinable for computation of court-fees and that is natural enough. The computation of court-fees in suits falling under section 7 (*iv*) of the Act depends upon the valuation that the plaintiff makes in respect of his claim. Once the plaintiff exercises his option and values his claim for the purpose of court-fees, that determines the value for jurisdiction. The value for court-fees and the value for jurisdiction must no doubt be the same in such cases; but it is the value for court-fees stated by the plaintiff that is of primary importance. It is from this value that the value for jurisdiction must be determined.......... As we have already indicated section 8 of the Suits Valuation Act postulates that the plaintiff should first value his claim for the purpose of court-fee and it provides for the determination of the value for jurisdiction on the basis of such claim. In our opinion, therefore, the learned Judges of the Madras High Court were in error in holding that the valuation for jurisdiction showed in the plaint should be taken to be the valuation for the payment of court-fees on the plaint as well as the memorandum of appeal. In view, of their prior decisions that the present case fell under section 7 (*iv*) (*b*), they should have allowed the appellant to amend his valuation for the payment of court-fees not only on the memorandum of appeal but also on the plaint".

16. The plaintiff in the aforesaid suit had not separately valued the claim for his half

1. 1958 S.C.J. 407: (1958) 1 An.W.R. (S.C.) 148: (1958) 1 M.L.J. 148: 1958 S.C.R. 1021: A.I.R. (1958) S.C. 245.

share in the property. Subsequently, he valued the relief in respect of the properties at Rs. 50,000. The question for consideration was whether in such circumstances, the plaintiff was entitled to have the plaint amended by mentioning the relief claimed to a half share of the properties for the first time as Rs. 50,000 and whether in view of section 8 of the Suits Valuation Act, that value should not be deemed to be the value for the purpose of jurisdiction, and the plaintiff was bound to treat his original value for purposes of jurisdiction at Rs. 15 lakhs as the valuation for purposes of court-fee also. The facts are not similar in the present case. What is relevant to be noted for the purpose of the present case is, what has been laid down by the learned Chief Justice at page 1039 in *Narayana* v. *Periappan*[1], *viz* ,

> "the scheme of the Act in this respect is to allow a plaintiff to value his relief at the figure he chooses, but it does not allow him to change that valuation. He is allowed to value for the purpose of the litigation and when he has done so his valuation governs the forum of trial and of appeal. There is no objection to an appellant abandoning on appeal a portion of the relief claimed in the lower Court or saying that he does not claim relief behind the figure corresponding to the value of the stamp, but unless he does this we are of opinion that he is bound by the valuation fixed by himself at the commencement of the litigation."...............

The petitioner-plaintiff in the present case has valued the relief at a particular amount and he does not seek to give up or abandon any portion of the relief claimed by him and he cannot therefore be allowed to make any amendment in the plaint, the effect whereof may be to reduce his liability to pay court-fee the relief already claimed in the plaint without abandoning any part of his claim.

17. Learned counsel for the petitioner lastly relied upon the following observation of Beg, CJ. and Desai, J., in *Ganesh Trading Company* v. *Moji Ram*[2]:

> "Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really in issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take........ It is true that if a plaintiff seeks alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time......".

The petitioner-plaintiff in the present case is, no doubt, not seeking by the amendment to put forward a new or inconsistent cause of action and there is no case of depriving the respondent-defendant by the amendment of any right which might have accrued to him under the law of limitation. But the petitioner has to satisfy the requirements of Order 6, rule 17 of the Code of Civil Procedure before he could be allowed to make the amendment in the plaint having regard to the aforesaid decisions of the Supreme Court in *Manohar Lal Chopra* v. *Rai Bahadur Rao Raja Seth Hiralal*[1] and *Arjun Singh* v. *Mohindra Kumar and others*[2].

18. In the affidavit filed in support of the petitioner for amendment, the petitioner after referring to what has happened in the trial Court regarding the question of the sufficiency of court-fee paid on the plaint and what was submitted before us on the question of the court-fee during the hearing of the appeal and after setting out amendments prayed for, has stated that the proposed amendments do not in any manner change complexion of the suit or the cause of action, that the respondent will not

1. I.L.R. (1938) Mad. 1031.
2. (1978) 2 S.C.J. 98: (1978) 2 S.C.R. 614 : (1978) 2 S.C.C. 91: A.I.R. 1978 S.C. 484.

1. (1962) 1 S.C.R. (Supp.) 450.
2. (1964) 5 S.C.R. 946.

in any way be prejudiced by the amendments being allowed, that the amendments would not cause any prejudice to the revenue as the petitioner will be bound to pay the court-fee for it in the trial Court on the amount that may ultimately be ascertained as due to him from the respondent and that the petitioner may, therefore, be permitted to amend the plaint as prayed for. The petitioner has not given any explanation for making the statements in the plaint which are now sought to be omitted, or how the amendments are necessary for the purpose of determining the real questions in controversy between the parties. The petitioner will not be entitled to have the plaint amended merely alleging that the amendment will not cause any prejudice to the respondent or the revenue. It is clear that the amendment has been prayed for only to make it appear that the court-fee already paid on the relief claimed is sufficient without at the same time giving up any portion of the relief claimed in the plaint. In these circumstances, in view of the aforesaid observation of the learned Chief Justice in *Narayana* v. *Periappan*[1], extracted above, it is not open for the petitioner to have the amendments made in the plaint.

19. The proposed amendments do not really help the petitioner, for the plaint, in the main, would be the same even after the amendments are made. According to paragraph 5 of the plaint, the general power of attorney given to the respondent on 22nd January, 1965 is to transact all the petitioner's business, sell the petitioner's properties and receive the sale proceeds and other monies etc., According to paragraph 6 of the plaint, the petitioner retired from the partnership leaving his own fourth share in the partnership including all its assets to be taken by Alagappa in consideration of Alagappa paying him 6,50,000 dollars equivalent to Rs. 16,12,000. According to paragraph 7 of the plaint, the respondent, as the petitioner's agent, received the said 6,50,000 dollars from Alagapa on or about 13th April, 1965. According to paragraph 8 of the plaint, the respondent remitted to the petitioner only four sums aggregating to Rs. 6,37,401-65 thereafter between the dates 25th October, 1965 and 11th August, 1967. It would appear from what the petitioner has stated in his affidavit filed in support of this amendment petition that the power of attorney is now sought to be confined or restricted to only the said sum of 6,50,000 dollars. This is clear from paragraph 3 of the affidavit where it is stated thus:

> "The respondent as my agent and on my behalf received on or about 13th April, 1965 from Alagappa 6,50,000 dollars. It is in relation to the said transaction of agency that I filed a suit against the respondent as my agent to render accounts".

The petitioner cannot be said to have any doubt about the quantum of money due to him from the respondent. It is Rs. 16,12,000 less the four sums aggregating to Rs. 6,37,401-65 paid to him by the respondent. This is clear from the aforesaid allegations made in the plaint and affidavit filed in support of the petition for amendment. Therefore we agree with the learned counsel for the respondent that the amendment does not really help the petitioner and is unnecessary.

20. The petitioner has contended in his reply affidavit that there is no delay in coming forward with the petition for amendment and that it has been filed at the earliest point of time. The written statement, where it has been contended *inter alia* that the suit is not properly valued and proper court-fee has not been paid had been filed in June, 1970, The petition for amendment has been filed only in November, 1978 after Appellant's arguments were concluded in the appeal. There can, therefore, be no doubt that there is considerable delay in coming forward with the petition though the petition could not be dismissed on that ground alone.

21. For the reasons stated above, we are of the opinion that the petitioner is not entitled to have the amendments prayed for made in the plaint and we dismiss the petition with costs. Advocate's fee Rs. 100.

R.S. ——— *Petition dismissed.*

1. I.L.R. (1938) Mad. 1031 at 1039.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

The Official Receiver, Salem .. *Petitioner**

v.

C. B. Samanthagam Ammal and others .. *Respondents.*

(A) *Partition Act (IV of* 1893), *sections* 2, 3, 6 *and 7—Plaintiff having a half share in property—Application for sale under the Act of the shares of the defendants—Court directing plaintiff to deposit a sum of Rs.* 20,000—*Three months time granted for depositing—Expiry of period fixed — Application for excusing delay in complying with the order of the Court—Application by Official Receiver alleging that creditors in Insolvency proceedings were entitled for the defendants' share and praying for direction to plaintiff to sell his half share on receiving Rs.* 20,000 — *Court excusing the delay in depositing the amount by the plaintiff — Delay excused and time extended—Order not contrary to provisions of Civil Procedure Code.*

(B) *Civil Procedure Code (V of* 1908), *Order* 21, *rules* 84, 85 *and* 86—*Sale under Partition Act, if governed by Order* 21, *rule* 85, *Civil Procedure Code—Code provisions apply only for public sale of property and not to all sales under the Partition Act.*

The Partition Act, itself contemplates two types of sales. Sections 2, 3 and 4 of the Act initially enable the sharers for a price to be fixed by the Court, to have an internal sale with the co-sharers and no question of public participation arises. The other type of sale is the one where the property is to be sold in public auction, when section 6 of the Act will become applicable, and the members of the public can bid in the Court-auction sale. Even in section 6 of the Act, clause (2) itself provides for the Court to stipulate about "the non-payment of deposit or as to setting off or accounting for the purchase money or any part thereof instead of paying the same into 'Court'". Hence, even the Partition Act, itself has contemplated stipulation of certain special terms and conditions, when sales are effected under the Act, and therefore it cannot be considered that the provisions made under Order 21, rules 84, 85 and 86, Civil Procedure Code, will alone be applicable to all types of sales under the Partition Act. Section 7 of the Partition Act, also is to the same effect by stating that "except as otherwise provided under the Act" properties can be sold under the Act following the procedure *as far as practicable*, which would mean that certain types of sales under the Act will come under a special category and they cannot be governed by sales that may be effected under the Code of Civil Procedure. Section 7 (*b*) of the Act empowers the High Court to frame Rules. Rule 9 in Chapter 3 also states that the Rules prescribed in Chapter 9, Part I, supra "as far as the same are applicable" shall be followed. Rule 200 found as part of Part I, Chapter IX (VII) states that the sales of property be conducted in the manner prescribed by the Code for the sale of attached property. The provisions made under sections 6 and 7 of the Partition Act and the Rules framed thereunder by the High Court, all go to show that all types of sales effected under the Partition Act, cannot be governed by the provisions of the Civil Procedure Code. But the Act itself contemplates a different mode of sale of shares in properties, and the Court has the power to decide about the terms as to non-payment of deposit, or setting off, or accounting for the purchase money or part thereof instead of paying the same into Court. In this case, the Court itself has granted three months time for depositing the amount, being fully aware of the provisions made under Order 21, rule 85, because that would not be applicable to the facts and circumstances of the case and the sale held under sections 2 and 3 of the Partition Act. Order 21, rules 84, 85 and 86 of the Code of Civil Procedure can be applied only for public sale of the property. But sections 2 and 3, cannot be invoked. [*Para.* 10.]

Even under section 6 (2) of the Act, the Court is enabled to make such provisions about deposit, and in this case, the Court has

*C.R.Ps. Nos. 2687 of 1978 and C.R.P. No. 2724 of 1978 (for merely numbered as A.O.O. No. 527 and 526 of 1976 and converted with C.R.P. as per order of Court dated 3rd November, 1978 and rule in C.M.P. No. 11428 and 11429 of 1978 respectively).

22nd December, 1978.

chosen to fix a period of three months and hence it has the inherent jurisdiction to extend the time granted by it without being inhibited by Order 21, rule 85, Civil Procedure Code. [*Para.* 10.]

Held, that the order made by the Court below cannot be held as one made against the provisions of Order 21, rule 85, Civil Procedure Code.

Cases referred to:—

M. M. Shah v. *Syed*, A.I.R. 1954 S.C. 349; *Subbammal* v. *P. C. Thevar*, (1974) 1 M.L.J. 501: 87 L.W. 263: A.I.R. 1974 Mad. 278; *Debendranath* v. *Haridas*; 15 C.W.N. 552; *Haricharan* v. *Fakir Chandre*, 40 C.W.N. 955; *Durgamma* v. *Sri L. Rice Factory*, (1946) 1 M.L.J. 107: 225 I. C. 498; A.I.R. 1946 Mad. 299; *R. Ramamurthi Iyer* v. *Raja V. Rajeswara Rao*, (1972) 2 S.C.C. 721.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the I Additional Subordinate Judge, Salem dated 19th June, 1976 and made in I.A. No. 1495 of 1974 in O.S. No. 652 of 1971 and I.A. No. 1407 of 1974 in O.S. No. 652 of 1971 respectively.

O. V. Balaswami, for Petitioner.

M. Kumaraswami Pillai, for Respondents.

The Court made the following

ORDER.—C.R.P. No. 2687 of 1978 is filed against an order made in I.A. No. 1495 of 1974 which was filed for grant of extension of time for depositing the sum of Rs. 20,000 into Court as ordered in I.A. No. 214 of 1971 dated 5th March, 1974.

2. C.R.P. No. 2724 of 1978 is filed against the order in I.A. No. 1407 of 1974 which was filed by the Official Receiver for directing the plaintiff in the suit to execute a sale of his half share in the suit properties on receiving a sum of Rs. 20,000. Apart from this, I.A. No. 1494 of 1974 was also filed for excusing the delay in filing I.A. No. 1495 of 1974. All these three interlocutory applications were heard and disposed of by the Court below by a common order dated 19th June, 1976.

3. In O.S. No. 652 of 1971, the plaintiff, having a half share in the properties, applied for sale of the shares of the defendants by invoking section 3 of the Partition Act and in I.A. No. 214 of 1971 dated 5th March, 1974, the Court directed him to deposit a sum of Rs. 20,000 within a period of three months from the date of that order. The period expired on 5th June, 1974. By that date, he could not deposit the amount as he was undegoing treatment in the hospital at Pondicherry from 10th April, 1974 to 21st May, 1974, and it is thereafter he came to know about the order of the Court and deposited the sum of Rs. 20,000 in the current account of his Advocate in the Lakshmi Vilas Bank Limited, Salem, and has produced the bank receipt to that effect, and it showed that the deposit was made on 5th October, 1974 (Exhibit A-1 and Exhibit A-2). Therefore he has come forward with an application for extension of time and for excusing the delay in complying with the orders of Court. In the meanwhile, Official Receiver had taken out I.A. No. 1407 of 1974 stating that the creditors, in insolvency proceedings entitled for the other half share, are prepared to deposit Rs. 60,000 and therefore a public sale will be advantageous to the creditors, and that the plaintiff not deposited the amount by 5th June, 1974 cannot ask for extension of time. The Court below held that a delay of about four months in depositing the amount is excusable under the facts and circumstances stated by the plaintiff, and hence granted time for making the deposit. Aggrieved by this order, these two revision petitions have been filed by the Officical Receiver, Salem.

4. Mr. O. V. Balasami, appearing for the petitioners contended that a sale under the Partition Act is also governed by the provisions contained in Order 21, rule 85, Civil Procedure Code, and the time prescribed under the said Rule being mandatory, the non-deposit of the amount within the time provided under the said Rule, will result in the sale itself being declared as a nullity, and that being so, there can be question of the Court below granting extension of time. The other contention raised by him is that the sale having been already directed under sections 2 and 3 of the Partition Act, sections 6 and 7

of the Act contemplated only a public sale, and therefore when the value of the property had appreciated, the application taken out by the Official Receiver for a public-auction will be in the interests of not only the creditors but also of the other sharer of the property, and hence the Court below ought to have directed a public sale of the properties.

5. On the first point, about the scope of the sale to be effected under the Partition Act and about the applicability of Order 21, rule 85, Civil Procedure Code, he refers me to the decision of the Supreme Court in *M. M. Shah* v. *Syed*[1], and also to the provisions of the Partition Act. Section 2 of the Partition Act, 1893, deals with the power of Court to order sale instead for division, in partition suits. If it is made out to the Court that a sale of the property and distribution of the proceeds would be more beneficial to all the shareholders, then the Court may, on the request of any of the shareholders individually or collectively, to the extent of one moiety or upwards, direct a sale of the property and thereafter the distribution of the sale proceeds. Under this section, the Court has the jurisdiction to direct a sale by public auction, only on the request of the shareholders. When a request is made under section 2, then section 3 of the Act comes into play, which enables a sharer of the property to ask for the valuation of the share or shares and ask for the sale of the shares at a price ascertained by Court which 'may give all necessary and proper directions in that behalf'. Hence, under section 3 of the Act, what can be sold, will be only the share or shares of such of those persons, whose share require to be sold, and it is not a sale in public-auction because the right to purchase the shares, is acquired by other sharers of the property. Section 4 of the Act will be applicable when dwelling houses are sold and a third party had purchased the shares of any of the shareholders therein and ask for partition. In this case, the property involved is a dwelling house. But section 4 of the Act will not be applicable, because there was no question of any third party having purchased the shares of any of the shareholders. Section 6 of the Act refers to a sale being directed to be held under section 2 of the Act. Clause 2 of section 6 states as follows: "On any such sale, any of the shareholders shall be at liberty to bid at the sale on such terms as to *non-payment of deposit* or as to setting off or accounting for the purchase money or any part thereof instead of paying the same as to the Court may seen reasonable". Section 7 of the Act deals with the procedure to be followed in case of sales. It is provided therein that save as otherwise provided under the Act, any property when it is directed to be sold under the Act, the procedure shall *as far as practicable,* be adopted, and clause (*b*) states that such sales be held according to such procedure as the High Court may, from time to time, by Rules prescribe and until such Rules are made, the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees be applicable.

6. Mr. O. V. Balasami, learned counsel contends that this is a case where section 2 of the Partition Act has been invoked and therefore under section 6 of the said Act, the sale has to be by public-auction and the procedure that is prescribed under section 7 of the Act shall be followed. The Madras High Court has framed Rules as provided under section 7 (*b*) of the Act and the Rules are found in Chapter III of Part II of the Civil Rules of Practice. Rule 9 therein provides that if, under the Partition Act, 1893, or otherwise, the sale of any property is ordered, an order for sale shall be made and the subsequent proceedings shall be conducted in manner prescribed by rules 193 to 205 of Chapter IX, Part I, *as far as the same are applicable,* provided rule 199 shall not apply to the said sale and the Court may grant leave to any party, to bid for and purchase the property, or any part thereof, on such terms as the Court thinks fit. Chapter IX, Part I, deals with general Rules about sale of property under orders of Court. Rule 193 contemplates that the sale of a property in public shall be conducted in the manner prescribed, thereafter under rules 194 to 205. Rule 200 deals with the manner in which the sale has to be conducted. It states that it shall be done in the manner prescrib-

1. A.I.R. 1954 S.C. 349.

ed by the Code for sale of attached property. Hence, he contends that since the High Court has framed Rules adopting the procedure to be followed under the Civil Procedure Code, Order 21, rule 85 comes into play and the Supreme Court held that when the amount is not deposited within time as provided under rule 85, the sale itself will be a nullity. *M. M. Shah* v. *Syed*[1]. The time provided therein is 15 days from the date of the sale of the property.

7. A reference is also made to the decision reported in *Subbammal* v. *P. C. Thewar*[2], which has followed the decision of the Supreme Court. The counsel for the respondents would contend that this is a case where only section 4 of the Partition Act, will be applicable, because the property involved is a dwelling house, and secondly, what was sold was only a share of the defendants and not a question of the property itself being sold and when alone the question of public-auction will arise under section 6 of Partition Act. He refers to the decisions reported in *Debendranath* v. *Haridas*[3] and *Hari Charan* v. *Fakir Chandre*[4], to show that when it is a sale under section 3 of the Act, it is only the shares of the co-sharers which can be sold, and there is no question of a public sale, because such a sale can take place only if section 6 of the Act can be applied. To substantiate this contention he refers to the decision in *Durgamma* v. *Sri L. Rice Factory*[5].

8. The other decision referred to by him is *R. Ramamurthi Iyer* v. *Raja V. Rajeswara Rao*[6], for the purpose of showing that the purpose underlying section 2 of the Partition Act undoubtedly is to prevent the property falling into the hands of the third parties, if that can be done in a reasonable manner. What is required to be considered when a sale is to be held under section 3 of the Act is to find whether the property is capable of division, and it is not necessary for the Court to give a positive finding that it is incapable of division by metes and bounds. It should only "appear" that it is not so capable of division.

9. In this case, at present there can be no dispute about the order that was made by the Court in I.A. No. 214 of 1971 dated 5th March, 1974 enabling the plaintiff to purchase the other half share of the property by depositing Rs. 20,000. Hence, the concept of public sale does not arise. This is a case where sections 2 and 3 of the Act have become applicable, and the Court has already decided that the half-share belonging to the defendants, can be purchased by the plaintiff. Therefore, unless it be made out that the Court had no power to extend the time which was granted in I.A. No. 214 of 1971, plaintiff, by showing sufficient cause to the Court, can get the delay excused in depositing the amount.

10. Therefore the first point taken by Mr. O. V Balasami, learned counsel for the petitioners that Order 21, rule 85, Civil Procedure Code, will be applicable to the order made in I.A. No. 214 of 1971 has to be considered. Section 7 of the Partition Act, deals with the procedure to be followed in cases of sales. This section itself starts by saying that "save as hereinbefore provided, the property can be sold under the Act". The Act itself contemplates two types of sales. Sections 2, 3 and 4 of the Act initially enables the sharers of the property to buy the shares of other sharers for a price to be fixed by Court, which would mean an internal sale within the co-sharers, and no question of public participation arises. The other type of sale is the one where the property is to be sold in public-auction, when section 6 of the Act will become applicable, and the members of the public can bid in the court-auction sale. Even in section 6 of the Act, clause (2) itself provides for the Court to stipulate about "the non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same into Court". Hence, even the Partition Act, itself has contemplated stipulation of certain special

1. A.I.R. 1954 S.C. 349.
2. (1974) 1 M.L.J. 501 : 87 L.W. 263 : A.I.R. 1974 Mad. 278.
3. 15 C.W.N. 552.
4. 40 C.W.N. 955.
5. (1946) 1 M.L.J. 107 : A.I.R. 1946 Mad. 299.
6. (1972) 2 S.C.C. 721.

terms and conditions, when sales are effected under the Act, and therefore it cannot be contended that only the provisions made under Order 21, rules 84, 85 and 86, Civil Procedure Code, will alone be applicable to all types of sales under the Partition Act. Section 7 of Partition Act, also is to the same effect by stating that "except as otherwise provided under the Act," properties can be sold under the Act following the procedure *as far as practicable,* which would mean that certain types of sales under the Act will come under a special category and they cannot be governed by the sales that may be effected under the Code of Civil Procedure. Section 7 (*b*) of the Act empowers the High Court to frame Rules and the Madras High Court has framed Rules which had been already referred to. Rule 9 in Chapter III also states that the Rules prescribed in Chapter IX, Part I supra "as far as the same are applicable", shall be followed. Rule 200 found as part of Part I, Chapter IX (VII) states that the sale of property be conducted in the manner prescribed by the Code for the sale of the attached property. The provisions made under sections 6 and 7 of the Partition Act and the Rules framed by the High Court, all go to show that all types of sales effected under the Partition Act cannot be governed by the provisions of the Code of Civil Procedure. But the Act itself contemplates a different mode of sale of shares in properties, and the Court has the power to decide about the terms as to non-payment of deposit or setting of or accounting for the purchase money or part thereof instead of paying the same into Court. In this case, the Court itself has granted three months time for depositing the amount, being fully aware of the provisions made under Order 21, rule 85, Civil Procedure Code, because that would not be applicable to the facts and circumstances of the case and the sale held under sections 2 and 3 of the Partition Act. Order 21, rules 84, 85 and 86 of the Code of Civil Procedure can be applied only for public sale of property. But when sections 2 and 3 of the Partition Act, are invoked even under section 6 (2) of the Act, the Court is enabled to make such provisions about deposit, and in this case, the Court has chosen to fix a period of three months, and hence it has the inherent jurisdiction to extend the time granted by it without being inhibited by Order 21, rule 85, Civil Procedure Code. Hence, the order made by the Court below cannot be held as one made against the provisions of Order 21, rule 85, Civil Procedure Code.

11. The Court below had accepted the reasons given by the plaintiff about his undergoing treatment in hospital and also about the deposit made by 5th October, 1974 and there are no materials to show that, what is claimed by the plaintiff is not true. Hence, these revision petitions are dismissed. No costs.

R.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ. and S. Ratnavel Pandian, J.*

The Deputy Commissioner of Commercial Taxes, Tiruchirapalli Division, Tiruchirapalli .. *Petitioner**

v.

A. Hajee Abdul Shakkoor Ex-partner Hajee Abdul Shukoot and Co., Shenbakkam, Vellore Taluk .. *Respondent.*

Tamil Nadu General Sales Tax Act (I of 1959), section 61 (1) (ii) (e)*—Partnership firm dissolved with effect from* 31*st March,* 1959*—Dealings in hides and skins—Assessment years* 1955-56 *and* 1956-57*—Whether assessment could be made on turnover of partnership firm under the* 1939 *Sales Tax Act—Answered in the negative.*

The assessee firm had been dissolved with effect from 31st March, 1959. The question was whether in respect of the assessment years 1955-56 and 1956-57 assessments could be made on the turnover of the partnership firm in hides and skins by the authorities by invoking the provisions of the Tamil Nadu General Sales Tax Act, 1939. The Tribunal held, that the department could not make an assessment. On revision,

* T.C. Nos. 339 and 340 of 1978 (Revision Nos. 116 and 117 of 1978). *8th January,* 1979.

Held: Applying the principle and ratio of the Supreme Court decision in *State of Punjab* v. *Jullundur Vegetables Syndicate,* (1966) 17 S.T.C. 326 (S.C.) and having regard to the provisions contained in section 61 (1) (*ii*) (*e*) of the Tamil Nadu General Sales Tax Act of the authorities were not enabled to bring to tax under section 19-A the dealings of dealers which functioned under the 1939 Act which did not provide for a power to assess such dealings in so far as they related to the dissolved firm. [*Para*. 3.]

Case referred to:—

State of Punjab v. *Jullundur Vegetable Syndicate,* (1966) 17 S.T.C. 326 (S.C.): (1966) 1 S.C.J. 665: A.I.R. 1966 S.C. 1295.

Petitions under section 38 of Tamil Nadu General Sales Tax Act, 1959 (See rule 30 of the Tamil Nadu General Sales Tax Rules, 1959), praying the High Court to revise the Order of the Court of the Tamil Nadu Sales Act Appellate Tribunal (Main Bench) Madras dated 17th March, 1977 and made in respective T.A. Nos. 807 and 808 of 1976. (Proceedings in respective Appeal Nos. 225 and 224 of 1976, on the file of the Appellate Assistant Commissioner (CT), Vellore against the proceedings in T.N.G.S.T. No. 798 of 1955-56 on the file of the Joint Commercial Tax Officer, Vellore (North) Vellore).

The Additional Government Pleader, for Petitioner.

The Order of the Court was made by

Ramaprasada Rao, CJ.—The Deputy Commissioner of Commercial Taxes, Tiruchirapalli, has filed these tax cases questioning the order of the Sales Tax Appellate Tribunal, Main Bench, dated 7th March, 1977. *Inter alia* the surviving question which was the main contention before the Tribunal was whether an assessment could be made on the turnover of a partnership firm which has been dissolved, by invoking the provisions of the Tamil Nadu General Sales Tax Act of 1939. The admitted fact is that the respondent an assessee firm, was dissolved with effect from 31st March, 1959. The course of litigation relating to the turnover of dealings in hides and skins has been a prolonged one and it, therefore, appears that even in the year 1979, we are concerned with the assessments of 1955-56 and 1956-57. The question which was moted in the main before the Tribunal was whether an assessment could be undertaken by the tax authorities notwithstanding the admitted fact that the firm in question has been dissolved with effect from 31st March, 1959 when the provisions of the Tamil Nadu General Sales Tax Act of 1939 were in force. No doubt under the provisions of the Tamil Nadu General Sales Tax Act of 1959 a special section was introduced under section 19-A, which enabled the authorities to undertake assessments on firms which have been dissolved. But the question is whether there was such a taxing provision under the 1939 Act. Learned counsel questions the order of the Tribunal which gave relief on the ground that in the absence of a taxing provision in the 1939 Act, which is the essential basis of taxation, no such undertaking by the taxing authorities to assess a dissolved firm and its dealings can be thought of. The learned Government Pleader, would, however, contend that the absence of such a provision would not matter. The Tribunal would not agree with him. Hence these tax cases.

2. The matter is both intrinsically and extrinsically concluded; intrinsically in the sense that the residuary clause dealing with the repeal of the Tamil Nadu General Sales Tax Act, IX of 1939, provides in sub-clause (*e*) of section 61 (1) (*ii*):

> "The repeal of the said Act by clause (*i*) shall not affect........
>
> (*e*) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted continued or enforced and any, such fine, penalty, forfeiture or punishment may be imposed, as if this Act has not been passed".

3. This is, therefore, a straight answer to the non-availability of the taxing power with the taxing authorities to get into the net of taxation the dealings of a dissolved firm which was functioning when the 1939 Act was in force. We said extrinsically also because the order of the Tribunal is unassail-

able, for the principle had been laid down by the Supreme Court in *State of Punjab* v. *Jullundur Vegetables Syndicate*[1], where the Court said that unless there is a statutory provision permitting the assessment of a dissolved firm, no assessment of a firm after its dissolution can be made under the quandom East Punjab General Sales Tax Act of 1948. A similar question is now the power before us. Applying the principle and ratio of the Supreme Court in the above case and having regard to the provisions contained in section 61 (1) (*ii*) (e), the authorities are not enabled to bring to tax the dealings of dealers which functioned under the 1939 Act which did not provide for a power to assess such dealings in so far as they relate to the dissoved firm.

The tax cases are dismissed.

S.J. ————*Petitions dismissed.*

1. (1966) 17 S.T.C. 326: (1966) 1 S.C.J. 665 : A.I.R. 1966 S.C. 1295.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

A. K. Vavallevvai Maricair Dharmam, Nagore, represented by A. K. V. Ahamed Maricair, sole and managing trustee

.. *Petitioner**

v.

The State of Tamil Nadu represented by the Collector of Thanjavur

.. *Respondent.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Lands) Act (LVIII of 1961), section 2—Muslim trust—Object of the trust to run a school where Muslim boys and girls were given lessons in Koran and also lectures in Islamic religion—Trust, one of religious nature.

In the instant case according to the trust deed, the object of the trust (which was a Muslim trust) was to run a madarasa where Muslim girls and boys were given lessons in Koran and also given lectures in Islamic religion. The question was whether the trust was of a religious nature entitled to claim exemption under section 2 of the Tamil Nadu Act (LVIII of 1961). The Authorised Officer held against the trust and an appeal to the Tribunal also failed. On revision to the High Court by the trustee claiming that the trust was of religious nature;

Held: The madarasa was intended to give only religious instructions to Muslim boys and girls and not general education. If it was merely a general education that was imparted, then, it will be charitable: But the entire object of the trust being to give religious instructions to Muslim boys and girls, that is, to spread religious tenets, the trust was only of a religious nature.

[*Para.* 7.]

Cases referred to:—

Makkaram Ali Khan v. *Anjumannunnissa Bivi*, (1923) I.L.R. 45 All. 152; *Sattar Ismail* v. *Hamid Sait*, I.L.R. (1945) Mad. 276: (1944) 2 M.L.J. 92: A.I.R. 1944 Mad.

* C.R.P. No. 1628 of 1976. 1st November, 1978.

504; *Bai Hirabai and Kesarbai Charitable and Religious Trust* v. *Commissioner of Income-tax*, 68 I.T.R. 821; *Muthuchami* v. *Muthiah Chettiar*, 1975 T.L.N.J. 21.

Petition under section 115, Civil Procedure Code, praying the High Court to revise the the order of the Sub-Court (Land Tribunal) Nagapattinam in C.M.A. No. 3 of 1976.

V. Srinivasan, for Petitioner.

Additional Government Pleader, for Respondent.

The Court made the following

ORDER.—The Authorised Officer, Nagapattinam, took proceedings under section 9 of the Tamil Nadu Act LVIII of 1961 in respect of the lands held by a trust called A. K. Vavallavai Maricair Dharmam, Nagore, and declared an extent of 21-88 standard acres as surplus by a draft statement under section 10 (1) of the Act. Against such a declaration, the managing trustee of the said trust filed an appeal and in that appeal the draft statement issued by the Authorised Officer was set aside and the matter was remitted to the Authorised Officer for fresh disposal. After remand the Authorised Officer took up the matter for fresh enquiry. Before the Authorised Officer, the managing trustee, one Ahamed Maricair, was examined as P.W. 1. He deposed that the trust was created by his father A. K. Varalebbai Maricair in 1934, that the object of the trust was to hold fatihas and conduct public feedings and mouluds (ceremonies) during the months of Mohurrum and Rabiyul Avval of the Arabic era. He also filed the trust deed, Exhibit P-1 to show that the trust created by the document is of religious nature. He also produced accounts relating to the trust, Exhibits P-3 to P-11 and P-19 as also Exhibit P-2, a partition deed under which some more properties have been set apart for the trust erected by Exhibit P-1. The Authorised Officer, after considering the recitals in the trust deed and the oral evidence of P.W. 1, held that the trust in question is not entitled to be declared as a public trust of religious nature, that the trust created under Exhibit P-1 is only of a charitable nature and that therefore, the trust is not entitled to claim exemption in relation to the lands held by it under section 2 of the said Act. There was an appeal to the Tribunal by the managing trustee. That appeal having failed, the trustee has come before this Court.

2. Before me it is contended that the objects set out in the trust deed, Exhibit P-1 are of religious nature, and therefore, the trust should be taken to come within the scope of section 2 of the Act. The learned counsel has taken me through the recitals in the trust deed, Exhibit P-1, and also the evidence of P.W. 1, the managing trustee, who has deposed as to the purpose for which the income from the trust is spent. According to the learned counsel, since the object of the trust was to run a madarasa wherein Muslim girls and boys are given religious lectures and also lessons in Koran, the trust deed should be taken to be of religious nature.

3. The learned Tribunal proceeds on the basis that the objects for which the trust has been created are to conduct mouluds (ceremonies) and fatihas and public feedings during the month of Mohurrum and Rabiyul Avval. According to the Tribunal the performance of mouluds, fatihas and public feedings are only of charitable nature and even if it is held that they are being performed by the trustees, no religious significance can be attached to those objects.

4. Though the order of the Tribunal refers to various charitable objects as being performed by the trustees, we have to decide the nature of the trust created under Exhibit P-1, only with reference to the objects specified therein and not with reference to the objects actually performed now as deposed by P.W. 1. The object specified in Exhibit P-1 is to run a madarasa where Muslim girls and boys are given lessons in Koran and also given lectures in Islamic religion. The actual words used in Exhibit P-1 are:

"இஸ்லாம் சம்பந்தமாக மார்க்க போதனைகளை வாய்ப்பாடமாக சொல்லிக்கொடுத்தும் அரபு, தமிழ் புக்ஹூதாபகள் மூலமாய் தொழுகை முதலான ஷரத்துக்களை கற்பித்தும் பிள்ளைகளை இராப்பாடம் ஓதும்படி தாக்கீது செய்தும் ...."

This indicates that religious instructions and lessons on Islamic religion are given in the

madarasa for the benefit of Muslim girls and boys. The question is whether the running of such madarasa will be taken to be a religious object or it is merely a charitable object.

5. The trust created for running such a madarasa is a public trust of religious nature as contemplated by section 2 of the Act. Admittedly, the madarasa has been founded for the benefit of Muslim girls and boys who form a section of the public. Therefore, that the institution is of public character, cannot be disputed. The question is whether the institution is of a charitable character or of a religious nature. Here as already stated, Exhibit P-1, the trust deed contemplates the running of a madarasa wherein the Muslim boys and girls are given lessons in Koran and also lectures on principles of Islamic religion. The trust deed does not merely direct the giving of general education to the Muslim boys and girls, but it specifically refers to religious instructions to be given and also the teaching of Koran to the boys and girls. That means, the madarasa is intended to give only religious instructions to Muslim boys and girls and not general education. If it is merely a general education that is imparted in the madarasa, then it will be charitable. But, as the main object of the madarasa is to give religious instructions to Muslim boys and girls, it can only be treated as pertaining to religion.

6. It has been held in *Makkaram Ali Khan* v. *Anjumanunnissa Bivi*[1], that a wakf created for reading of fateha and for charitable purposes including the maintenance of the founder's poor relations and dependants was valid according to the Muhammadan law. In that case the main purpose of the endowment was the remembrance of the anniversary of the Inam Hussain Saheb and the holding of annual majlis on that occasion to celebrate it. Since the said celebration involved the offering of prayers and reading of Holy Koran, the trust was held to be a valid public religious endowment. The principle laid down in that case was approved by this Court in *Sattar Imail* v. *Hamid Sait*[2]. In that case, the founder of the wakf merely directed Koran to be read over his tomb. Reading of Koran either in a public or a private place was regarded as of religious and pious object and it was also taken to be a charitable object as reading of the Koran is for the benefit of all Muslims. It was observed in that case that even if the money is spent on reading of Koran in private places that will not detract from the religious, pious and charitable character of the object. In *Bai Hirabai and Kesarbai Charitable and Religious Trust* v. *Commissioner of Income-tax*[1], the Bombay High Court has approved the principle laid down by the Madras High Court in *Sattar Ismail* v. *Hamid Sait*[2], and has held that the reading of holy Koran is not only a religious and pious act, but it would constitute a valid purpose of public religious endowment. These decisions clearly lay down that where a trust has been created for the purpose of running a madarasa for teaching Koran and for giving religious instructions to Muslim boys and girls, the trust should be taken to be of a religious character.

7. The learned counsel for the respondent would however point out that it has been held by a Division Bench of this Court in *Muthuchami* v. *Muthiah Chettiar*[3], that mere running of a Vedapatasala will not amount to a religious purpose and that in view of the reasoning in that decision, the trust in this case cannot be held to be of religious nature. In that case, an endowment had been created for running a patasala teaching Yajur Veda in the temple premises. It was claimed that the said trust will come under the definition of religious endowment. The Division Bench took the view that teaching of Yajur Veda by itself will not be of a religious object so as to convert the endowment into a religious endowment, that a religious institution is one in which worship is done to an idol or some service is done to an idol or in connection with a festival in a temple, and that the location of the Veda Patasala in the temple premises will make no difference any more

1. (1923) I.L.R. 45 All. 152.
2. I.L.R. (1945) Mad. 276: (1944) 2 M.L.J. 92: A.I.R. 1944 Mad. 504.

1. 68 I.T.R. 821.
2. A.I.R. 1944 Mad. 504.
3. (1975) T.L.N.J. 21.

than if an ordinary school imparting secular instruction were situate therein. I do not see how the principle laid down in that case will apply to the facts of the case before us. In the above case, the patasala was started only for teaching Yajur Veda and the Court held that teaching of Yajur Veda by itself cannot be said to be a religious object since the teaching of Yajur Veda is not connected with any religious object. In this case, however, the object of running a madarasa for which the trust was created is to impart instructions in Islamic religion and to teach Koran to the Muslim boys and girls. Therefore, the entire object of the trust was to give religious instructions to Muslim boys and girls, that is, to spread religious tenets, and therefore, the trust is only of religious nature.

8. The result of the above discussion is that the trust which has been created with the object of running a madarasa wherein religious instructions are to be imparted to the Muslim boys and girls is a public trust of religious nature, and it will therefore, come under the exemption provided under section 2 of the Act. The Civil Revision Petition is therefore allowed. There will be no order as to costs.

S.J. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Venugopal, J.*

L. K. K. Gafoor .. *Petitioner**

v.

M. T. Lakshmana Mudaliar (died) and another .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (a) (iii)—*Non-residential building — Portion required by landlord for running a tea stall—Petition for eviction dismissed by Rent Controller but allowed by Appellate Court—Revision by tenant—Pending revision death of landlord—Whether requirement of landlord lapses after his death — Right not personal but incorporeal right annexed to the estate of the deceased and passing on to his heirs—Absence of averment in petition of building being required for carrying on business by landlord or his family members—Effect — Non-personal action not converted into personal action.*

The landlord of a non-residential building filed an eviction petition against the tenant of a portion requiring the same for running a tea stall. The landlord lost the case before the Rent Controller but succeeded before the Appellate Court. The tenant filed a revision to the High Court. Pending revision, the landlord died and his wife *R* was brought on record. The tenant claimed that the requirement of the landlord was personal to him and on his death, it lapsed and could not enure to the benefit of his legal heirs.

Held: When the landlord obtained an order of eviction under section 10 (3) (*a*) (iii) of Act XVIII of 1960 such a right could not be characterised as a personal right which came to an end with the death of the landlord. It was an incorporeal right annexed to the estate of the deceased and it could be taken advantage of by the legal representatives of the deceased. The order of eviction secured by the landlord in the present case was a right which was annexed to the

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* C.R.P. No. 3877 of 1975. *1st March,* 1979.

property and it could not be divested by his death and would, therefore, pass on to his heirs as being part and parcel of the property owned by the landlord. [*Para.* 5.]

The absence of an averment in the petition that the building was required for carrying on business by the landlord or the members of his family would not by itself convert a non-personal action into one of personal action. The statutory exception is provided under section 10 (3) (*a*) (*iii*) (of Act XVIII of 1960) to the doctrine *actio personalis moritur cum persona*. Hence it could not be governed or controlled by the pleadings of parties and hence would not come to an end on the death of the first respondent (landlord). [*Para.* 5.]

Cases referred to:—

Muhammad Ibrahim v. *Rahiman Khan*, 1947 M. W. N. 655: (1947) 2 M.L.J. 654; *Shantilal Thakordas* v. *Chimanlal Maganlal Telwala*, 1976 R.C.J. 811; *Vijayaraghavan* v. *Mohamed Yakub Rowther*, (1976) 1 M.L.J. 128: 89 L. W. 81: A.I.R. 1976 Mad. 205.

Petition under section 25 of Tamil Nadu Act XVIII of 1960, as amended by Act XXIII of 1973 praying the High Court to revise the Order of the Court of the Small Causes (III Judge) Madras, dated 29th September, 1975 and made in H.R.A. No. 100 of 1975 (H.R. C. No. 1931 of 1973 (Court of Small Causes (VII Judge), Madras).

N. Sivamani and *N. Krishnamitra*, for Petitioner.

R. Desikan, V. R. Bhiksheswaran and *K. Ranganathan*, for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner, respondent before the lower Court, was a tenant under the first respondent in respect of one portion of a non-residential building comprised in No. 179-A, Ramakrishna Mutt Road, Mylapore, Madras, on a monthly rent of Rs. 100. The landlord, the first respondent herein, filed an application for eviction of the petitioner on the ground that the portion occupied by the petitioner is required by the first respondent for running a tea stall and the first respondent was not in occupation of any non-residential building in the City of Madras. The Trial Court dismissed the petition holding that the first respondent had not taken steps for securing licence for running the tea stall and the requirement of the building by the first respondent was not a *bona fide* one. On appeal, it was held that the mere fact that the first respondent had not obtained licence from the Police and Corporation for running a tea stall in the premises cannot be considered as a fact against him, and the Corporation licence and Police licence can always be secured by the first respondent after getting the order of eviction. The appellate Court came to the conclusion that requirement of the building by the first respondent was a *bona fide* one, and disagreeing with the findings of the trial Court passed an order of eviction against the petitioner. Aggrieved against the order of the appellate Court, the petitioner has come up before this Court by way of revision.

2. During the pendency of the revision petition, the first respondent died and his wife has been impleaded as the second respondent.

3. The main contention of the petitioner is that the order for eviction passed under section 10 (3) (*a*) (*iii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 on the ground of personal requirement of the first respondent for carrying on business in the building is personal to the first respondent, and after his death, it lapses and cannot enure to the benefit of his legal heirs. In support of the contention, the decision in *Muhammad Ibrahim* v. *Rahiman Khan*[1], is relied on. The learned counsel for the second respondent contended that the doctrine that a personal right dies with the person, cannot be invoked having regard to the statutory provisions contained under section 10 (3) (*a*) (*iii*) of the Act and the eviction order passed gives a vested right which runs with the estate and cannot be divested by the death of the first respondent, and the eviction order passed enures to

1. (1947) 2 M.L.J. 654: (1947) M.W.N. 655.

the benefit of the legal heirs of the deceased first respondent as it has became annexed to the property. In support of this contention, the learned counsel for the second respondent relies on a decision of the Supreme Court in *Shantilal Thakordas and others* v. *Chimanlal Maganlal Telwala*[1], and the decision of the Madras High Court in *Vijayaraghavan* v. *Mohammed Yakub Rowther and others*[2].

4. In the case of *Shantilal Thakordas*[1], a partnership styled as Jai Hind Silk Weaving Works, had three partners. One of the partners, Thakordas Bhagwandas, filed a suit for eviction of the tenant from the premises on the ground that the building was required for the use of the partnership firm. The trial Court ordered eviction. During the pendency of the proceedings before the High Court, Thakordas Bhagwandas died and his legal heirs were impleaded. The High Court held that the right to sue did not survive to the heirs of Thakordas Bhagwandas and on the short ground set aside the order of eviction. On a further appeal, the Supreme Court held:

> "If the law permitted the eviction of the tenant for the requirement of the landlord 'for occupation as a residence for himself and members of his family', then the requirement was both of the landlord and the members of his family. On his death the right to sue did survive to the members of the family of the deceased landlord. We are unable to take the view that the requirement of the occupation of the members of the family of the original landlord was his requirement and ceased to be the requirement of the members of his family on his death. After the death of the original landlord the senior member of his family takes his place and is well competent to continue the suit for eviction for his occupation and the occupation of the other members of the family".

In *Vijayaraghavan* v. *Mohammed Yakub Rowther and othes*[2], the landlady filed an application under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 on the ground that she wanted the leased premises for her husband's business. Eviction was ordered. During the pendency of the appeal, the landlady died and her husband, her son and daughter were brought on record and the appeal was further prosecuted. The order of eviction was confirmed against which the tenant came up on revision before this Court. During the pendency of the revision petition, the husband of the landlady also died. The question arose whether the son and daughter were entitled to the benefit of the order of eviction. It was held that the exception to the doctrine *actio personalis moritur cum persona* that a personal right dies with the person can be certainly invoked having regard to the peculiar nature of the right obtained by the landlord under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of ted. The order of eviction was confirmed 1960), and what the order of eviction secured is not a personal right, but an incorporateal right vested in the landlord and cannot be divested by his death, and it could pass on to the heirs as it becomes part and parcel of the property owned by the landlord.

5. The general principle *actio personalis moritur cum persona* has some well recognised exceptions. The short question for consideration is whether the order of eviction passed in the present case falls within that exception. Section 10 (3) (*a*) (*iii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act provides that if the landlord requires a non-residential building for carrying on business by himself or members of his family, he can file a petition for eviction of the tenant, provided he or the members of his family are not in occupation of any non-residential building in that locality. The very fact that section 10 (3) (*a*) (*iii*) provides that the landlord can require the building occupied by the tenant for carrying on business by him or the members of his family is a clear indication to show that the section itself provides a statutory exception to the doctrine *actio personalis moritur cum persona*. When the landlord obtains an order of eviction under section 10 (3) (*a*) (*iii*), such a right cannot be characterised as a personal right which comes to an end with the death of the landlord. It is an incorporeal right

1. (1976) R.C.J. 811.
2. (1976) 1 M.L.J. 128: 89 L.W. 81: A.I.R. 1976 Mad 205.

annexed to the estate of the deceased and it can be taken advantage of by the legal representatives of the deceased. The order of eviction secured by the landlord in the present case is a right which is annexed to the property and it cannot be divested by his death and would, therefore, pass on to his heirs as being part and parcel of the property owned by the landlord. It is contended for the petitioner that the landlord filed the application for eviction on the ground that he required it for the purpose of carrying on business by him and not by the members of his family, and in the face of such averment in the petition for eviction, the order of eviction passed is personal to the landlord and comes to an end with his death. The absence of an averment in the petition that the building was required for carrying on business by the landlord or the members of his family will not by itself convert a non-personal action into one of personal action. The statutory exception provided under section 10 (3) (*a*) (*iii*) of the Act to the doctrine *actio personalis moritur cum persona* cannot be governed or controlled by the pleadings of parties and hence will not come to an end on the death of the first respondent. It will certainly enure to the benefit of his legal heir, the second respondent herein. In this view, the order of eviction passed is confirmed, and the revision will stand dismissed, with costs. 4 months time granted for vacating the building.

S.J. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

Ramu Nadar and others .. *Appellants**

v.

Sundararaja Iyengar and others .. *Respondents.*

Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), section 3 (b)—Suit for redemption—Kudiwaram othied by inamdar — Application of the provisions of Act XXVI of 1963 — Effect on the right of redemption.

The kudiwaram in the suit properties was othied by the inamdar which was sought to be redeemed. The point in controversy was whether the application of the provisions of the Tamil Nadu Act XXVI of 1963 would have any effect on the right of the first respondent to seek redemption of the property in question. It was contended by the appellants that the right of redemption was lost because under the vesting section, the inamdar had lost his right, and consequently could not maintain a suit for redemption. This was negatived by the Courts below. On second appeal,

Held: In view of the judgments of the Madras High Court in *Kuttachi* v. *Muhammed Sultan Rowther*, (1975) T.L.N.J. 451 and in L.P.A. No. 1 of 1979, there was no substance in this second appeal.

[*Para.* 4.]

Case referred to:—

Kuttachi v. *Muhammad Sultan Rowther*, (1975) T.L.N.J. 451.

Appeal against the decree of the Court of the Principal Subordinate Judge, Ramanathapuram at Madurai in Appeal Suit No. 107 of 1973 preferred against the decree of the District Munsif of Paramakudi in O.S. No. 506 of 1970.

* S.A. No. 1798 of 1975.

16*th February*, 1979.

T. R. Srinivasan and *K. Ramamurthi*, for Appellants.

P. S. Srisailam, for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 1, 3, 6, 13 and 18 are the appellants in this second appeal, which arises out of a suit for redemption instituted by one Sundararaja Iyengar, the first respondent herein, and one Soundaralakshmi who figured as the first plaintiff in the suit and on whose death, the first respondent herein was recorded as her legal representative.

2. The only question that had been seriously raised and strenuously contended before the Courts below has lost much of its substance in view of two judgments of this Court, to which I shall refer a little later. The point in controversy is whether the application of the provisions of the Tamil Nadu Act XXVI of 1963 will have any effect on the right of the first respondent to seek redemption of the property in question. It is common ground that under Exhibits A-1 to A-5 the kudiwaram in the properties was othied by the inamdar which is sought to be redeemed. It was contended by the appellants that the right of redemption was lost because under the vesting section, the inamdar had lost his right, and consequently could not maintain a suit for redemption. This had been negatived by the Courts below and hence the second appeal.

3. I may point out that this question no longer survives in view of two Bench decisions of this Court reported in *Kuttachi and others* v. *Muhammed Sultan Rowther*[1], disposed of on 8th July, 1975, by a Division Bench consisting of Veeraswami, CJ. and Natarajan, J., wherein it was held that though the hypotheca is situate in a part inam village notified and taken over under the Tamil Nadu Act XXVI of 1963, still for purposes of redemption the jural relationship between the mortgagor and the mortgagee remained unaffected. In L.P.A. No. 1 of 1979 another Division Bench of this Court, consisting of Kailasam, CJ. and Balasubrahmanyan, J., took the same view though there is no reference to the judgment referred to earlier by me. On a consideration of the provisions of the Act XXVI of 1963, particularly the scope of the vesting section under section 3 (*b*) and the other related provisions for the grant of patta, the Bench observed:—

> "The mortgagors' suit for redemption cannot be resisted on the ground that the estate had been taken over by the Government under Act XXVI of 1963. The relationship of mortgagor and mortgagee continues and there can be no legal objection to the mortgagors redeeming the property and getting possession from the usufructuary mortgagee".

Dealing with the proceedings for the grant of patta, the Bench observed that the mere fact that patta had been either applied for or granted to the mortgagees will not in any manner affect the situation. It was further stated by the Bench that the question whether a person is entitled to redeem the property or not is totally outside the scope of the provisions of Act XXVI of 1963 and this in the view of the Bench was one good reason as to why the jural relationship should be held to have been left intact to be dealt with by the civil Court.

4. In view of these judgments referred to, there is no substance in this second appeal, which fails and is dismissed. There will be no order as to costs.

S.J. ——— *Appeal dismissed.*

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1. (1975) T.L.N.J. 451.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

The Union of India, represented by the Executive Engineer, Coimbatore Central Division, C.P.W.D., Coimbatore

.. *Appellant**

v.

S. Nataraja Pillai .. *Respondent.*

Arbitration Act (X of 1940), section 30—Agreement between a C.P.W.D. contractor and Union Government for constructing a building—Agreement containing arbitration clause that "all disputes between the contractor and the Executive Engineer" were referable to arbitration—Execution of contract—Contractor asked to do some substituted work — Claim by contractor for extra payment — Maintainability of claim—Award—Application to set aside—Meaning of "all disputes".

Where an application was made under section 30 of the Arbitration Act to set aside an award on a claim by a contractor against the C.P.W.D. on the ground of the claim being outside the concerned agreement,

Held: The words "all disputes" seen to be wide as wide can be for determining the scope of the arbitration. They comprehend any and every dispute between the contracting parties as respects the construction of the work. [*Para.* 5.]

It is not possible to cut down the effect of the words "all disputes" occurring in clause 25 of the contract in the instant case, so as to exclude from arbitration disputes over rates and disputes over payment for extra work. Building contractors asking for more is no uncommon thing even in C.P.W.D. construction jobs. Buildings are not in a day built and part of the hazards of the building trade, especially in modern economics is the escalation in the cost of men and material even while work is in progress. The question is not whether the contract itself allows any claim for higher rates, but whether such claim is comprehended by expression "all disputes" employed in the arbitration clause. In this contract, it seems to be reasonable to hold that "all disputes" in the arbitration clause mean and include not only disputes which arise out of its actual implementation but also disputes which arise out of their implementation. Even disputes which are strictly *de hors* the contract would be entertainable by the arbitration as being within the scope of the reference.

[*Paras.* 9, 10.]

Cases referred to:—

Herman v. *Darwins Ltd.*, 1942 A.C. 356; *Gaya Electric Supply Co., Ltd.* v. *State of Bihar,* 1953 S.C.R. 572: 1953 S.C.J. 217: (1953) 1 M.L.J. 605: 66 L.W. 532: A.I.R. 1953 S.C. 182; *M. Union* v. *Ganesh Sugar Mills,* A.I.R. 1956 All. 601; *Punjab State* v. *Motiram,* A.I.R. 1957 Punj. 222.

Appeal against the order of the Sub-Court of Coimbatore dated 28th April, 1972 in O.P. No. 110 of 1970.

T. Chengalvarayan, for Appellant.

V. Syamalam, for Respondent.

The Court made the following.

ORDER.—This civil miscellaneous appeal raises a point about the construction of an arbitration clause in a building construction contract between the Union Government and a C.P.W.D. contractor. The contract was for construction of an Annexe to the Comptroller's Office building at Trivandrum at an estimated cost of about Rs. 5,47,000. The work was to be completed within 18 months. But, as the work progressed, the Government extended the time by two years. Apparently because of the time lag, the contractor incurred additional costs and expenses in the construction work. He accordingly applied to the Government for an upward revision of rates. During the execution of the contract, the contractor was also asked to do some substituted work. For this also he asked for extra payment. The Government, however, refused to pay him a pie more than what the contract had originally specified. In consequence, the contractor referred the matter for arbitration.

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*A.A.O. No. 280 of 1975.

16*th June,* 1978.

2. The arbitrator entertained the reference. There were as many as four claims in dispute. The arbitrator dismissed one of them and allowed the rest in part. In money terms, the arbitrator passed an award directing the Government to pay the contractor a sum of Rs. 10,021 over and above the amount payable to him under the contract.

3. The Government thereupon moved the Sub-Court, Coimbatore, under section 30 of the Arbitration Act, to set aside the award as invalid. Their contention was that the reference which the arbitrator had entertained was beyond the ambit of the arbitration clause in the contract between the C.P.W.D. and the contractor. The learned Subordinate Judge rejected this contention. He said that the arbitration agreement was wide enough to cover the claims made by the contractor in this case. He accordingly upheld the validity of the award, observing that section 30 of the Arbitration Act cannot be invoked in this case. In this appeal, Mr. Chengalvarayan, learned Senior Central Government Standing Counsel, submits that the disputes entertained by the arbitrator were beyond the scope of the arbitration agreement.

4. Initially, at the hearing of this appeal, I felt a good deal of difficulty in considering this point. For, neither the construction contract, as a whole, nor the text of the relevant clause therein, which contained the arbitration agreement, was placed before me. But, the order of the learned Subordinate Judge indicated what the scope of the arbitration clause was. In the absence of the original text, I reckoned I might well act on the learned Judge's version of it. According to the learned Judge, the arbitration clause mentioned 'all disputes between the contractor and the Executive Engineer of the Union of India' as referable to arbitration.

5. The words '*all* disputes' seem to me to be wide as wide can be for determining the scope of the arbitration. They comprehend any and every dispute between the contracting parties as respects the construction work.

6. Mr. Chengalvarayan's argument, however, was that even though clause 25 had employed an unqualifiedly wide language, it was yet necessary, as a matter of construction to limit the scope of the arbitration and confine it within the bounds of the construction contract. He said that what the contractor claimed in this case was different from, and in excess of, what the contract had laid down. He said that the disputes before the arbitrator were wholly *de hors* the contract between the parties.

7. I do not agree with the learned counsel's understanding either of the scope of the arbitration clause or of the nature of the disputes which arose between the parties. It is true that the contractor, like Oliver Twist, asked for more. But on that account the claim cannot be held to fall outside the scope of the arbitration clause. The argument of Mr. Chengalvarayan, to my mind, involves the mixing up of two things which have got to be kept separate. One is whether the contractor's claim is or is not covered by the terms of the contract. The other is whether the dispute is covered by the arbitration clause. The answer to the latter question does not depend on the answer to the former question, but has to be found on a construction of the terms of the arbitration clause alone.

8. There are many cases in the books which deal with the construction of arbitration clauses in agreements. The trend of recent decisions would seem to disclose a tendency on the part of Courts both here and elsewhere to construe these clauses in *a liberal spirit*. *Herman* v. *Darwins Ltd.*[1], decided by the English House of Lords is a fair sample of this approach. Citing the House of Lords, our own Supreme Court in *Gaya Electric Supply Co., Ltd.* v. *State of Bihar*[2], has laid down that an arbitration clause is a written submission agreed to by the parties to a contract, and like every written submission to arbitration such a clause must also be considered according to its language and in the light of the circumstances in which it is made.

9. Following the liberal tradition, I am unable to see how I can possibly cut down the effect of the words 'all disputes' occurring

1. (1942) A.C. 356.
2. 1953 S.C.R. 572: 1953 S.C.J. 217: (1953) 1 M.L.J. 605: 66 L.W. 532: A.I.R. 1953 S.C. 182.

in clause 25 of the contract in the instant case, so as to exclude from arbitration disputes over rates and disputes over payment for extra work. Building contractors asking for more is no uncommon thing even in C.P.W.D. construction jobs. Buildings are not built in a day, and part of the hazards of the building trade, especially in modern economics, is the escalation in the cost of men and material even while work is in progress. I do not mean to suggest that this variable element of cost does not enter into the reckoning even while the contractor submits his tender in the first place. But, the question in this appeal is not whether the contract itself allows any claim for higher rates, but whether such a claim is comprehended by the expression 'all disputes' employed in the arbitration clause. The position, I grant, might possibly have been different had the parties employed some such variant as "all disputes touching the interpretation of this agreement", 'all disputes relating to this contract', 'all disputes arising from this contract', 'all disputes arising out of this contract' and the like. Indeed, in the case before the Supreme Court, which I cited earlier, the arbitration clause, in terms, referred only to the contract-oriented disputes, unlike clause 25 in the present case which uses the expression 'all disputes' without frills. In a strict sense, therefore, the particular construction which the Supreme Court placed on the arbitration agreement which they had to consider in that case cannot serve as a model for the present case.

10. I am also impressed by yet another consideration. It will have been observed that the Government in this case had enlarged the time for completion of the contract by nearly two years, and had also directed the contractor to construct certain 'substituted' works. This being so, the claim for extra payment which the contractor put forward in his final bills could not be said to be entirely unrelated to the performance of the contract, even if it might not have strictly accorded with the framework of the rates as originally inscribed in the contract. In this contract it seems to me an eminently reasonable construction of the arbitration clause to hold that 'all disputes' must mean and include not only disputes which arise out of the interpretation of the contract, but also disputes which arise out of its actual implementation. In this case, even disputes which are strictly *de hors* the contract would be entertainable by the arbitration as being within the scope of the reference.

11. Mr. Chengalvarayan cited before me, *M. Union* v. *Ganesh Sugar Mills*[1], where a Bench of the Allahabad High Court held that disputes between a sugar mill and cane growers relating to deductions made in the contracted purchase price for sugarcane cannot be brought before an arbitrator. A perusal of this judgment shows that the real basis for the Court's decision was that the dispute between the parties arose not as respects a contract providing for arbitration, but as respects a different contract which did not provide for it. This decision is, therefore, of no use to the present discussion.

12. Mr. Chengalvarayan cited in the course of his arguments a decision of a learned single Judge of the Punjab High Court reported in *Punjab State* v. *Motiram*[2]. I must refer to this case in some detail because it appears to support the kind of approach which I have adopted as the right one in the present case. In the case before the Punjab High Court, a building contractor entered into a contract with the Government, to build staff quarters. There was an arbitration clause in the contract for reference of disputes 'relating to the contract'. In the course of execution of the contract work, the contractor was asked to do certain works which were not strictly covered by the work orders issued by the authorities. When the final bills were presented disputes arose in regard to payment for those extra items of work. These were referred to the arbitrator in terms of the arbitration clause in the contract. The question which the Court was subsequently invited to consider was whether items of work which did not, in terms, form the subject-matter of the original contract could properly be referred to arbitration. On this question, the learned Judge observed:—

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1. A.I.R. 1956 All. 601.
2. A.I.R. 1957 Punj. 252.

"Even if it be held the contractor has done some work which is not covered by the items mentioned in the work orders, a claim for payment of this extra work would be covered by the arbitration agreement. It is after all a dispute which relates to the contract".

The learned Judge proceeded to observe that every deviation from the original terms of a contract would not render the dispute relating to that deviation fall outside the scope of the arbitration.

13. It seems to me that the above reasoning must apply with greater force to the present case, in the view I have expressed that when the parties had unqualifiedly agreed to refer 'all disputes' to arbitration they must be held to have agreed to refer even disputes which are *de hors* the contract.

14. In the event, I must uphold the validity of the award as being within the bounds of the arbitration clause in the contract. The result is that I dismiss this civil miscellaneous appeal and confirm the judgment and decree of the learned Subordinate Judge. I however, make no order as to costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

R. Kalyanakrishnan .. *Petitioner**

v.

Authorised Officer (Land Reforms) Tirunelveli .. *Respondent.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Lands) Act (LVIII of 1961), *sections* 52 *and* 94—*Deed of gift treated as void as preventing operation of section* 94—*Consideration for treating transaction void—Duty of Court or tribunal to give finding.*

The mere fact that the transactions are likely to impinge on the provision of the Land Reforms (Fixation of Ceiling on Lands) Act is by itself not sufficient to hold that the concerned documents are void. If that were the intention then section 22 need not entrust the question of deciding the *bona fides* to be decided by the Authorised Officer under that section, and it can straightaway say that all documents executed between the date of commencement of the Act and the notified date which will naturally infringe the provisions of the Act will automatically be void. Therefore the fact that the documents are likely to affect or infringe in any way the provisions of the Act itself cannot be a ground for holding the documents to be void. In addition to that fact it has to be established that the transactions covered by the documents were not real, but were intended only to defeat the provisions of the Act, and that the transactions were only sham and colourable and not intended to be given effect to by the person who executed the documents.

[*Para.* 4.]

In view of the fact that the petitioner had adduced some evidence to show that he had parted with his title and possession in relation to the properties he had transferred by way of gift the evidence should have been considered and finding given thereon. The fact that the transferees had not adduced evidence to prove their possession and enjoy-

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* C.R.P.No. 913 of 1977.

15th December, 1978.

ment of the concerned properties is no reason for non-consideration of the evidence let in by the transferor [*Para.* 5.]

Case referred to:—

Naganatha Iyer v. *Authorised Officer*, (1971) 1 M.L.J. 274: 84 L.W. 67.

Petition under section 83 of the Tamil Nadu Land Reforms Act (LVIII of 1961) to revise the order of the Sub-Court (Land Tribunal), Tirunelveli dated 30th September, 1976 in C.M.A. No. 14 of 1974.

K. Venkataswami and *V. Subramanian*, for Petitioner.

A. Swami, for Additional Government Pleader, for Respondent.

The Court made the following

ORDER.—Between the date of commencement of Tamil Nadu Act LVIII of 1961, as amended by Act XVII of 1970 and the notified date, the petitioner herein, had transferred certain lands under two documents in favour of two persons on 18th February, 1970 and 16th February, 1970 by way of gift deeds. The gift deed dated 16th February, 1970 comprised of 1.80 acres equivalent to 1.5 standard acres, and the gift deed, dated 16th February, 1970 comprise of 1.295 standard acres. Thus the total extent covered by the two gift deeds was 2.975 standard acres. The Authorised Officer treated these two gift deeds as void under section 22 and included these lands as part of the holding of the petitioner and determined his total extent at 16.964 standard acres. That means, there was a surplus of 1.946 standard acres on the date of the commencement of the Act. The inclusion of the lands gifted away by the petitioner in his holding was challenged by him by filing an appeal before the Land Tribunal but without success. The petitioner has therefore approached this Court challenging the decision of the Land Tribunal which in turn affirmed the decision of the Authorised Officer.

2. Before me the learned counsel for the petitioner contends that the Authorised Officer has erred in holding that both the gift deeds are void under section 22 and that the reasons given for holding the gift deeds to be void are not correct. It is also submitted by the learned counsel for the petitioner that the Authorised Officer has not gone into the question of *bona fides* at all but merely proceeded to declare the gift deeds as void on the basis that the gift deeds infringed the provisions of section 94 of the Act. The learned counsel also relies on a judgment of this Court in *Naganatha Iyer* v. *Authorised Officer*[1], and submits that the principles laid down in that decision have not been followed either by the Authorised Officer or by the Tribunal.

3. It is seen from the order of the authorities below that the documents were held to be void mainly for the reason that by executing the said two gift deeds the petitioner has prevented the operation of section 94, and, therefore, they are to be taken to defeat the provisions of the Act. Though the main reason for holding the documents to be void is that the transactions defeat the provisions of the Act, they have also given the reason that though the gift deeds have been executed by the petitioner, the transferees have not let in any evidence to show that the lands have been taken possession of by them and enjoyed in pursuance of the gift deeds and cannot be taken to be real.

4. As regards the main reason given for voiding the gift deeds under section 22, the authorities below had clearly proceeded on an erroneous basis. The mere fact that the transactions are likely to impinge on the provisions of the Act is by itself not sufficient to hold that the documents are void. If that were the intention, then section 22 need not entrust the question of deciding the *bona fides* to be decided by the Authorised Officer under that section, and it can straightaway say that all documents executed between the date of the commencement of the Act and notified date which will naturally infringe the provisions of the Act will automatically be void. Therefore, the fact the documents are likely to affect or infringe in any way the provisions of the Act itself cannot be the ground for holding the documents to be void. In addition to that fact it has to be established that the transactions covered by the documents

1. (1971) 1 M.L.J. 274 : 84 L.W. 67.

were not real, but were intended only to defeat the provisions of the Act, and that the transactions are only sham and colourable and not intended to be given effect to by the person who executed the documents. This has been clearly laid down by this Court in the decision referred to above. Therefore, it is not possible to hold that merely because the gift deeds have an impact on section 94 of the Act, they are void. In addition to that fact the enquiry by the Authorised Officer under section 22 should have been to find out whether the documents had been executed by the petitioner *bona fide* with an intention to really pass title to the donees under the two documents or whether they were merely sham and nominal. On this aspect of the case, both the Authorised Officer as well as the Tribunal have stated that though notices were given to the transferees, the transferees did not appear before the Authorised Officer and adduce any evidence to show that they had actually taken possession of the properties and are enjoying the same ever since the date of the execution of the gift deeds in their favour. In the absence of any evidence on the side of the transferees, the Authorised Officer was not inclined to treat the gift deeds as *bona fide* transactions. The Tribunal also concurred with this view.

5. In this case, it is true that the transferees have not appeared before the Authorised Officer even though notice of the enquiry was given to them and they have not adduced any evidence to prove that they are in enjoyment of the properties gifted to them ever since the dates of the gift deeds. However, the petitioner who is the transferor has adduced evidence to prove that he has parted with not only title but possession in respect of the gifted lands. He has also adduced evidence to show that lands transferred have been registered in the gift deeds. But the mere fact that the registry has been changed in the names of the donees will not automatically prove that the lands have been taken possession of by the donees and they are being enjoyed by them. To find out whether the gift deeds are real, it has to be seen whether the transactions of gift had been given effect to by the petitioner. For that purpose, as to who is in actual possession of the property since the date of gift deeds will be very material. If possession has not been handed over and the properties continue to be with the petitioner a reasonable inference could be drawn that the gift deeds are only colourable transaction. In this case, both the Authorised Officer and the Tribunal have proceeded on the basis that they have taken possession of the properties and are in enjoyment of the same ever since the date of the gift deeds, and therefore, the documents cannot be *bona fide* transactions. But having regard to the fact that the petitioner had adduced at least some evidence to show that he has parted with title as well as possession in relation to the properties covered by the gift deeds, that evidence should have been considered and a finding given thereon. The mere fact that the transferees have not let in any evidence to prove their possession and enjoyment of the properties transferred to them is not a reason for non-consideration of the evidence adduced by the transferor. Therefore, the orders of the authorities below have to be set aside and matter remitted to the Authorised Officer for fresh consideration in the light of what has been stated above. The Authorised Officer will give a finding on the question of possession and enjoyment of the properties transferred subsequent to the date of the gift deeds. The petitioner is at liberty to adduce further evidence on the said question. The Civil Revision Petition is allowed as stated above. No costs.

R.S. ——— *Petition allowed and case remitted back.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

P. Lachiram .. *Petitioner**

v.

K. N. Kumaresan .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *(as amended by Act XXIII of* 1973), *section* 11 (4)—*Application by landlord under section* 11 (4) —*Enquiry —Application to be disposed of expeditiously.*

The proceedings under section 11 (4) of the Tamil Nadu Buildings (Lease and Rent Control) Act are intended to accelerate the long-drawn proceedings under the Act. As eviction is possible in a case where the tenant commits wilful default in the payment of rents and particularly after the recent amendment in 1973 explaining "wilful default" as meaning non-payment or tender of rent after the issue of a notice calling for such payment of rent by the landlord, the importance of section 11 (4) has to be brought to light and in its true light.

Even here, the Legislature has provided that the Rent Controller, in a case, where an application under section 11 (4) is taken by the landlord should enquire into the dispute as to the amount of rent to be paid by the tenant and make such enquiry as he deems necessary and summarily determine the rent so to be paid or deposited. Such enquiry should not be long-drawn as in the case with proceedings. They are intended to be summary and they are to be disposed of at least within four weeks from the date when such applications are filed. These would be therefore a directive to the lower Court to see that applications under section 11 (4) are heard and decided within two months from the date of presentation of such applications. There is absolutely no justification to keep such application beyond such time. This is an observation to the Courts below, so that hereafter at least there may be an accelerated disposal of Rent Control matters. [*Para.* 2.]

It is only to safeguard the interest of the landlords in relation to such recalcitrant tenants that a provision like section 11 (4) has been introduced. The very purpose of this said section would be lost if the order of eviction is not passed early by the Courts below. [*Para.* 5.]

Petition under section 25 (1) and (2) of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act (XXIII of 1973), praying the High Court to revise the order of the Court of Small Causes, Madras (IV Judge) dated 19th August, 1978 and made in H. R. A. No. 180 of 1978 (M. P. No. 869 of 1977) in H.R.C. No. 1831 of 1976, VII Judge, Court of Small Causes, Madras.

P. Muthukrishnan, for Petitioner.

P. Ananthakrishnan Nair and *S. F. Rahuman,* for Respondent.

The Court delivered the following

JUDGMENT.—There is no error of jurisdiction in the order. Both the Rent Controller and the Appellate Authority went into the question in detail and found as to what was the amount payable by the tenant and after giving him sufficient opportunity to pay or to deposit the rent as determined (in this case it was not even disputed), the Rent Controller passed a final order directing the petitioner-tenant to put the landlord in possession of the building because of non-compliance. It is as against the concurrent findings of fact and the ultimate conclusions arrived at by the two Tribunals that the present Civil Revision Petition has been filed.

2. A proceeding under section 11 (4) of the Act is intended to accelerate the long-drawn proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act. As eviction is possible in a case where the tenant commits wilful default in the payment of rents and particularly, after the recent amendment in 1973 explaining wilful default as meaning non-payment or tender of rent after the issue of a notice calling for such payment of rent by the landlord, the importance of section 11 (4) has to be brought to light and in its true light. Section 11 (4) is, therefore, intended to make the tenant alert during the

* C.R.P. No. 2258 of 1978. 16*th November*, 1978.

entirety of the proceedings and be conscious of his obligations and statutory duties in the matter of payment of rents. Even here, the Legislature has provided that the Rent Controller in a case where an application under section 11 (4) is taken by the landlord should enquire into the dispute as to the amount of rent to be paid by the tenant and make such enquiry as he deems necessary and summarily determine the rent so to be paid or deposited. Such enquiry should not be long-drawn as in the case with the main proceedings. They are intended to be summary and they have to be disposed of at least within four weeks from the date when such applications are filed. This would be therefore, a directive to the lower Court to see that applications under section 11 (4) are heard and decided within two months from the date of presentation of such applications. There is absolutely no justification to keep such applications beyond such time. This is an observation to the Courts below, so that hereafter at least there may be an accelerated disposal of the rent control matters.

3. In the instant case, the application under section 11 (4) was filed by the landlord in a Rent Control Petition of the year, 1976. This was filed in or about June, 1967. The Rent Controller disposed of the matter on the 29th of December, 1977 holding that the tenant in, spite of opportunities given, did not deposit the amount which was admittedly payable by the tenant. Therefore, she stopped all the proceedings under section 11 (4) and passed final orders of eviction. This matter was taken up in appeal before the Appellate Authority. This came up nearly an year thereafter in August, 1978. The order of eviction was stayed by an interlocutory order. It appears that a conditional order was made in April, 1978 directing the tenant to pay the admitted arrears of rent to the tune of Rs. 1,000. Nothing was done excepting a payment of Rs. 300 on 24th April, 1978. Further time was granted for payment of the balance. The case was adjourned to 15th June, 1978. Even then, no payment was made. Finally, the appeal was taken up on 16th August, 1978 when the Appellate Court agreed with the Rent Controller and allowed the application under section 11 (4) and sustained the order of eviction. It is as against this the present revision petition has been filed.

4. Having regard to the dates to which the matters have been adjourned from time to time this Court has been constrained to pass the above observation in the nature of a directive to the Courts below in the matter of disposal of application under section 11 (4).

5. On the merits, there is absolutely no case for the petitioner-tenant. He was not only given opportunities which were several by the Rent Controller but also by the Appellate Authority which also gave many indulgences for clearance of the arrears. In spite of it, nothing has been done. It is only to safeguard the interests of the landords in relation to such recalcitrant tenants that a provision like section 11 (4) has been introduced. The very purpose of the said section would be lost if the order of eviction had not been passed early by the Courts below. Rightly the Courts found that the admitted arrears have not been paid in spite of several opportunities given to the tenant. It was in these circumstances, the order was made under section 11 (4). They had the jurisdiction to do it. There was sufficient material to act upon and the decision on such material arrived at by the Courts below is correct.

6. The Civil Revision Petition is dismissed. Provided all arrears of rent are paid by one month from this date, the petitioner shall have four months' time to vacate.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

S. Perumal Chettiar .. *Appellant**

v.

T. Santhanam .. *Respondent.*

Negotiable Instruments Act (XXVI of 1881), section 118—Promissory note — Passing of consideration—Presumption—Plea of defendant that note was not supported by cash consideration as recited in the note — Plaintiff whether entitled to recover on the footing of note being supported by consideration though not in the shape recited in the note.

Though the question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact, the presumption is not left to the discretion of the Court, and in every suit on a negotiable instrument, the Court shall presume that such instruments were made, drawn, accepted or negotiated for consideration, so much so, it has been held that where the lower Court ignored the presumption and found that the instrument was not supported by consideration, the decision regarding consideration was vitiated. [*Para.* 6.]

In the instant case, when the execution of the promissory was admitted, a presumption was raised in favour of the plaintiff that the said instrument was made for consideration, and when the presumption was raised, it had the effect of shifting the burden on to the defendant to establish that there was no consideration. In this case the defendant had not satisfied the Court that there was no consideration whatever with reference to the promissory note sued on because it was his admission even in the written statement that the promissory note represented the interest due on the mortgages admittedly executed by him. The mere fact that the mortgages were not produced before the Court would not make any difference nor would it detract from the effect of admission made by the defendant in the written statement. In this view it may be said that even the burden which shifted on to the defendant was not discharged by him in view of the clear and careful admission made by him. But, even otherwise, if the defendant had established, in this case, that the promissory note was not supported by consideration as recited therein and the burden shifted on to the plaintiff, would it be still open to the plaintiff to recover on the footing that the promissory note is supported by consideration though not necessarily in the shape of the consideration recited in the promissory note? With reference to this, two views have been taken. One is that the presumption regarding consideration under section 118 of the Negotiable Instruments Act is not merely confined to what is mentioned in the negotiable instrument but for any kind of consideration which is valid consideration under law. The other view is where the recital of consideration under the promissory note is admittedly false and not made out, then the presumption under section 118 of the Negotiable Instruments Act is displaced and thereby the burden is shifted to the holder of the promissory note as against the maker of the note himself. [*Para.* 6.]

Cases referred to:—

Kundanlal v. *Custodian, Evacuee Property,* (1963) 1 S.C.J. 347: (1963) 1 An.W.R. (S.C.) 85: (1963) 1 M.L.J. (S.C.) 85: A.I.R. 1961 S.C. 1316; *Tetamchand Haji Abdul* v. *Syed Ebrahim,* A.I.R. 1949 Bom. 257; *Haribhavandas Parasaran and Company* v. *A. D. Thakur,* A.I.R. 1963 Mys. 107; *Alex Mathew* v. *Phillips,* A.I.R. 1975 Ker. 21; *Palaniappa Chettiar* v. *Rajagopalan,* A.I.R. 1928 Mad. 773; *G. Venkata Reddi* v. *Nagi Reddi,* (1951) 1 M.L.J. 569: 64 L.W. 475: A.I.R. 1951 Mad. 851.

Appeal against the decree of the Sub-Court Dindigul in A.S. No. 224 of 1972 preferred against the decree of the District Munsif's Court, Periyakulam in O.S. No. 714 of 1972.

K. Sarvabhauman and *Nandakumar,* for Appellant.

C. F. Louis and *R. Vijayan,* for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff who had lost in the Courts below is the appellant in this Second

*S.A. No. 76 of 1976. 20*th February,* 1979.

Appeal. The suit was laid by him for the recovery of a sum of Rs. 3,200 on the basis of a promissory note, Exhibit A-1, dated 23rd July, 1970 for a sum of Rs. 2,860. Since the respondent did not make any payment towards the promissory note, the appellant sent a registered notice Exhibit A-2 on 30th June, 1972, demanding the amounts due under the promissory note. The respondent herein sent a reply under Exhibit A-3, dated 3rd July, 1972, admitting the execution of the promissory note and at the same time setting out the circumstances under which the promissory note came to be executed. Since the amount was not paid in spite of the demand by the appellant, the appellant instituted the suit O.S. No. 714 of 1972 on the file of the District Munsif's Court, Periyakulam, for the recovery of the amounts due under the pronote.

2. The respondent, in his written statement, admitted the execution of the promissory note sued upon, but contended that though he had usufructuarily mortgaged the properties for Rs. 3,500 in favour of the appellant, it was agreed that the respondent should continue to cultivate the properties, and in lieu of that interest at the rate of 24 per cent. per annum should be paid and a lease deed to this effect was also executed by the respondent and as the interest was not paid by the respondent the promissory note was executed by him towards interest.

3. The learned District Munsif, Periyakulam who tried the suit held that in view of the admission of execution of the promissory note by the respondent it was the duty of the respondent to establish that the suit promissory note is not supported by consideration. In dealing with this aspect of the matter, the learned District Munsif, entered into an unnecessary discussion with reference to the improbabilities attendant upon the advance of moneys under Exhibit A-1 but ultimately, he was of the view in paragraph 6 of his judgment, "the suit promissory note should have been executed only for the interest for the amount due on the mortgage deeds admittedly executed by the respondent in favour of the appellant". Having stated this, the learned District Munsif proceeded to consider the circumstances that there was an earlier occasion when a similar promissory note in respect of the interest due on the mortgage was admittedly executed by the respondent in favour of the appellant under Exhibit B-1, dated 22nd February, 1969, which according to the learned District Munsif, was further proof of the stand of the respondent that the appellant used to get promissory notes for interest due on mortgage amounts. Having thus held, the District Munsif examined the evidence of the scribe and purporting to accept his evidence to the effect that no consideration passed, the learned District Munsif finally concluded that "the suit promissory note was executed only for the interest for the mortgage amount". After having found all this the learned District Munsif dismissed the suit.

4. Against this the appellant preferred an appeal A.S. No. 224 of 1972, before the Subordinate Judge, Dindigul. Before the Subordinate Judge, Dindigul, the judgment of the trial Court was challenged mainly on two grounds. Firstly, it was urged that having regard to the admission of the execution of the promissory note, the respondent had not satisfactorily established that the promissory note is not supported by consideration especially in the face of the finding of the trial Court that the promissory note represents interest due on the mortgages executed by the respondent in favour of the appellant. Secondly, it was contended before the lower appellate Court that since the promissory note represented interest on the mortgages the appellant was entitled to recover the same, though the promissory note had recited the passing of cash consideration. The learned Subordinate Judge, Dindigul, took into account the circumstances that on an earlier occasion, a similar promissory note under Exhibit B-1, dated 29th February, 1968 was executed by the respondent in favour of the appellant towards interest due, and held that the suit promissory note is not supported by cash consideration. Though the lower appellate Court did not differ from the conclusion of the trial Court that the promissory note represented interest due on the mortgages executed by the respondent in favour of the appellant, on this aspect of the case, the learned Subordinate Judge, while meeting the contention of the appellant that the appellant is

entitled to recover the suit claim as interest for the mortgages, negatives the same on the ground that the mortgages have not been produced in this case and that they have also not been marked and that there is therefore, no satisfactory evidence to show that interest had not been paid for the mortgages. Ultimately, he agreed with the trial Court and dismissed the appeal.

5. In this Second Appeal, the learned counsel for the appellant challenges the conclusions of the lower appellate Court on the following two grounds—(1) Having regard to the admission of due execution of the promissory note by the respondent in favour of the appellant, the presumptions under section 118 of the Negotiable Instruments Act would therefore be immediately attracted, and it is therefore, the duty of the respondent to displace or rebut that presumption, which has not been done in the instant case. (2) Having regard to the finding of the trial Court that the promissory note represents the interest due on mortgages admittedly executed by the respondent in favour of the appellant, the promissory note even as admitted in the written statement, is supported by consideration, though not in the manner recited in Exhibit A-1, and consequently, the appellant is entitled to recover the amounts due thereunder.

6. In *Kundanlal* v. *Custodian, Evacuee Property*[1], Subba Rao, J., (as he then was), dealing with the question of the burden of proof in its twin aspects as a matter of law and pleading and as one of establishing a case pointed out that the former is fixed as a question of law, on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant, but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. With particular reference to section 118 of the Negotiable Instruments Act, the Supreme Court observed thus:—

> "As soon as the execution is proved, section 118 of the Negotiable Instruments Act imposes a duty on the Court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and if, he adduced acceptable evidence, the burden again shifts to the plaintiff and so on. The defendant may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff".

Though the question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact, the presumption is not left to the discretion of the Court, and in every suit on a negotiable instrument, the Court shall presume that such instruments were made, drawn, accepted or negotiated for consideration, so much so, it has been held that where the lower Court ignored the presumption and found that the document was not supported by consideration, the decision regarding consideration was vitiated. In the instant case, what has happened is, the first Court has recorded a finding that it is supported by consideration, though the consideration related to the interest on the mortgages executed by the respondent in favour of the appellant. This finding has not at all been disturbed by the lower appellate Court, and therefore, the lower appellate Court was not quite correct in holding that the promissory note was not supported by consideration of any kind. In the instant case, when the execution of the promissory note was admitted, a presumption was raised in favour of the plaintiff that the said instrument was made for consideration, and when this presumption was raised, it had the effect of shifting the burden on to the defendant to establish that there was no consideration. In this sense, the defendant had not satisfied the Court that there was no consideration whatever with reference to the promissory note sued on, because it was his admission even in the written statement that the promissory note represented the interest due on the mortgages admittedly executed by him. The mere fact that the mortgages were

1. (1963) 1 S.C.J. 347 : (1963) 1 An.W.R. (S.C.) 85 : (1963) 1 M.L.J. (S.C.) 85 : A.I.R. 1961 S.C 1316.

not produced before the Court would not make any difference nor would it detract from the effect of admission made by the defendant in his written statement. In this view, it may be said that even the burden which shifted on to the defendant was not discharged by him in view of the clear and categorical admission made by him. But, even otherwise, if the defendant had established, in this case, that the promissory note was not supported by cash consideration as recited therein and the burden shifted on to the plaintiff, would it be still open to the plaintiff to recover on the footing that the promissory note is supported by consideration though not necessarily in the shape of the consideration recited in the promissory note? With reference to this, two views have been taken. One is that the presumption regarding consideration under section 118 of the Negotiable Instruments Act is not merely confined to what is mentioned in the negotiable instrument but for any kind of consideration which is valid consideration under law. The other view is where the recital of consideration under the promissory note is admittedly false and not made out, then the presumption under section 118 of the Negotiable Instruments Act is displaced and thereby the burden of proof is shifted to the holder of the promissory note as against the maker of the note himself.

7. In *Tetamchand Haji Abdul* v. *Syed Ebrahim*[1], Chagla, CJ., had occassion to consider this question. Said the learned Chief Justice at page 257:

> "What has been urged before us is that as soon as it is shown that the consideration mentioned in the negotiable instrument is not the real consideration, the presumption under section 118 is rebutted and it is on the plaintiff who is suing on the negotiable instrument to prove what the real consideration was. Looking to the plain language of the section, it is impossible to accept that contention, because the presumption that is raised under section 118 is not in respect of the consideration mentioned in the negotiable instrument, the presumption in favour of there being a consideration for the negotiable instrument, any consideration which is a valid consideration".

Later at page 259, the learned Chief Justice further observed as follows:—

> "It is perfectly true that if a particular consideration is mentioned in a negotiable instrument and that consideration is found to be false and some other consideration is set up, that is a factor which the Court would take into consideration, in deciding whether the defendant has discharged the burden cast upon him by section 118. But, it is a very different thing to say that merely because the consideration mentioned in the negotiable instrument turns out to be false, therefore, the statutory presumption is rebutted, and burden is thrown upon the plaintiff to prove the consideration".

Again at page 259, the learned Chief Justice makes the following observation:—

> "In order to determine whether the contrary is proved or not, as required by section 118 the whole volume of evidence led before the Court must be considered........but in considering the whole volume of evidence, the Court must always bear in mind the statutory presumption under section 118 and also the fact that the burden has got to be discharged by the defendant".

8. In *Haribhavandas Parasaran and Co.* v. *A. D. Thakur*[1], the above observations of Chagla, CJ., were referred to and it was held that—

> "It is mandatory that the presumption under section 118 (*a*) should be made until the contrary is proved. The fact that the nature of the consideration as recited in the negotiable instrument is different from that alleged in the plaint may have to be considered by the Court at a later stage, along with the entire evidence in this case, while determining whether the contrary to the statutory presumption has been proved. But, the mere existence of such a fact

1. A.I.R. 1949 Bom. 257.

1. A.I.R. 1963 Mys. 107.

would not, by itself, be a justification for the Court to disregard section 118 and frame an issue casting burden on the plaintiff to prove the consideration for a negotiable instrument, the execution of which has been admitted. The burden should still be on the defendant to prove want of consideration".

9. In *Alex Mathew* v. *Philips*[1], a Division Bench of the Kerala High Court had occasion to consider the same question and the Bench held—

"The true principle where different cases have been pleaded and evidence has been let in, in support of both these sets of cases, is that the entire evidence in the case adduced by the plaintiff and the defendant and the findings entered by the Court or which are to be altered by the Court as well as the presumptions of law and fact which have to be drawn from all the facts established and attendant circumstances must be looked into as a whole to find out whether the presumption under section 118 (*a*) of the Act has been rebutted or not. It would not be correct merely on the basis of the finding negativing the case of the plaintiff regarding consideration to hold that the presumption under section 118 (*a*) has been rebutted".

10. In so far as this Court is concerned, in *Palaniappa Chettiar* v. *Rajagopalan*[2], a Division Bench of our Court consisting of Phillips and Odgers, JJ., had occasion to go into this question and it has been held that where the recital of the consideration in the pronote is admittedly false, the burden of proving consideration is shifted on to the holder of the promissory note as against the maker of the note himself and much stronger, therefore, would be the case when the consideration has to be proved against third parties. In *G. Venkata Reddi* v. *Nagi Reddi*[3], Basheer Ahmed Sayeed, J., in dealing with a similar question with reference to the burden of proof when the recital in the negotiable instrument regarding consideration is not made out, (where the recital in the promissory note was that consideration was paid, but in the plaint it was pleaded that the consideration was lease amount, that was due from the defendant) held that the decision in *Palaniappa Chettiar* v. *Rajagopalan*[1], would prevail, as otherwise it will cause serious injustice.

11. In the light of the principles laid down in the above cases, if the facts of the present case are examined, the result that emerges is that initially on the admission of execution of the promissory note sued upon, the burden shifted to the defendant to establish that the promissory note was not supported by that kind of consideration as was mentioned in the promissory note, and even accepting the evidence of D.W. 2 in the instant case, that no cash consideration was actually paid, the burden shifted on to the plaintiff to establish that the promissory note was supported by a different kind of consideration than what was recited in the promissory note. In the light of the judgment of the Supreme Court and the Division Bench in *Palaniappa Chettiar* v. *Rajagopalan*[1], thereafter, the burden of proving that the promissory note is still supported by consideration, shifted to the plaintiff and in the instant case, there was no need for the plaintiff to further establish that the promissory note was supported by consideration in view of the specific admission that was made by the defendant in the written statement that the pronote came to be executed in lieu of the interest on the mortgages executed by him. The same result may also be arrived at on the reasoning that the admission in the written statement could be relied upon by the plaintiff which the defendant attempted to rebut by contending that there are no arrears of interest relying on Exhibit B-3. The lower appellate Court proceeds on the basis that if Exhibit B-3 should indicate that even that interest in respect of the mortgages for which Exhibit A-1 was executed has been paid off, and consequently the defendant had discharged his burden of establishing that the promissory note is really not supported by consideration, I am of the view that Exhibit B-3

1. A.I.R. 1975 Ker. 21.
2. A.I.R. 1928 Mad. 773.
3. (1951) 1 M.L.J. 569 : 64 L.W. 475 : A.I.R. 1951 Mad. 851.

1. A.I.R. 1928 Mad. 773.

does not indicate or establish any such payment towards interest due on the mortgages or a discharge of the interest. The recitals in Exhibit B-3 specifically refer to arrears of interest and request that arrangement should be made by the defendant for the payment thereof, and this cannot by any means be construed as if there is no outstanding interest payable towards the interest on the mortgages. Having regard to these considerations, I am of the view that the dismissal of the suit by the Courts below is not at all correct and the suit should have been decreed. Accordingly, I set aside the judgments and decrees of the Courts below and allow the second appeal with costs throughout.

R.S. ——— *Second appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

G. P. Govindarajulu .. *Petitioner**

v.

The State of Tamil Nadu, represented by the Collector of Tanjore .. *Respondent.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), sections 3 (36-A) and 5 (3)—Private trust — Definition — Petitioner holding lands within ceiling limits, creating a trust and endowing property — Trust purely private — Authorised Officer's clubbing of the lands endowed with the holding of the founder not valid.

"Private trust" is defined in section 3 (36-A) of the Tamil Nadu Land Reforms Act and section 5 (3-A) deals with the land held by a private trust. For the purpose of the Act the land owned by a private trust shall be deemed to be the land owned by the beneficiaries under the private trust and each such beneficiary shall be deemed to be the owner of the land to the extent of the share of his beneficial interest in the said trust. The *Explanation* to that sub-section says that the trustees of a private trust shall be deemed to be a beneficiary if any income or part thereof from such private trust is enjoyed by him or his heirs or family of his heirs. In law, even a private trust has to be treated independently of the founder of the trust or the beneficiaries. The definition of a person in section 3 (34) includes a private trust, and therefore, a private trust as a person is entitled to hold lands upto the ceiling limit prescribed by section 5. This is, however, subject to section 5 (3-A) read with section 6. In cases where the beneficiaries under a private trust can claim any specified share therein, then that specified share can be included in the holding of the beneficiary. Similarly, where the properties belonging to the private trust is enjoyed by the founder or by his heirs, then the trust or his heirs are treated to be the beneficiaries for the purpose of section 3 (3-A) and therefore to the extent of their benefit the lands belonging to the trust have to be included in the holding of the trustees. But, in the present case the trust deed clearly provides that the entire income has to be utilised for the pooja and neivediam of the idol of Lord Krishna and that the trustees or his heirs are not entitled to utilise any portion of the income from the trust property for their benefit. Therefore, there is absolutely no possibility of the founder or the heirs of the founder enjoying any benefit from the trust properties. Sections 5 (3-A) and 6 cannot apply for the reason that the founder or his heirs are not beneficiaries of the trust and they are not entitled to utilise any portion of the income from the trust properties for their benefit. If section 5 (3-A) is to be applied, then the only beneficiary under the trust deed being the idol of Lord Krishna, the trust lands should be taken to belong to the idol. Even then the lands cannot be clubbed with the lands held by the founder as has been done in this case. [*Para.* 4.]

Petition under section 83 of Tamil Nadu Act LVIII of 1961, praying the High Court to revise the order of the Court of the Land Tribunal, Nagapattinam dated 25th March, 1976 in C.M.A. (OT) No. 98 of 1975—MPT 98/G/NGT/A-5, Authorised Officer, (Land Reforms), Nagapattinam,

* C.R.P. No. 1950 of 1976. 14th December, 1978.

K. Chandramouli, for Petitioners.

A. Sivaji, for Additional Government Pleader, for Respondent.

The Court made the following

ORDER.—The petitioner herein held lands of an extent of 15.31 standard acres on the commencement of Tamil Nadu Act LVIII of 1961 as amended by Act XXXVII of 1972. Another extent of 3.42 standard acres had been endowed by the petitioner to a trust called 'Krishna Bhagvan Trust' under a document marked as Exhibit B-1, dated 24th January, 1970. The said land endowed by him for the above trust was proposed to be included in his holding by the Authorised Officer. That was objected to by the petitioner. But, his objection was overruled and the trust lands were included in the petitioner's holding and his total holding was determined at 18.73 standard acres. The view of the Authorised Officer was challenged by the petitioner before the Land Tribunal but without success. The petitioner has, therefore, approched this Court by way of this revision petition.

2. According to the petitioner, the lands are admittedly held by the trust and that no part of the income from the said trust properties can be utilised by the founder or members of the founder's family under the document Exhibit P-1 and, therefore, the lands held by the trust should not have been included in the holding of the petitioner. The Tribunal took the view that the trust does not satisfy the requirements of a religious trust of a public nature and that finding in my view, cannot successfully be challenged. Admittedly, the idol of Lord Krishna has been installed inside the petitioner's house and the public have no access to or right of worship of the said deity. Therefore, the trust though of a religious nature can only be a private trust. The Tribunal then proceeded to say that as the trust is of a private nature, the lands owned by the trust should be clubbed with the lands of the petitioner as the word 'person' in section 3 (34) included a private trust as well as a public trust. The question is whether this view is correct.

3. The finding of the Tribunal that the trust called 'Krishna Bhagvan Trust' is a private trust has not been challenged before me by the petitioner. Therefore we have to proceed on the basis that the lands are held by a private trust. There is also no dispute that a private trust as in this case cannot get exemption under section 2 of the Act.

4. 'Private trust' has been defined in section 3 (36-A) of the Act and section 5 (3-A) deals with the land held by a private trust. That section says that for the purpose of this Act the land owned by a private trust shall be deemed to be the land owned by the beneficiaries under the private trust and each such beneficiary shall be deemed to be the owner of the land to the extent of the share of his beneficial interest in the said trust. The *Explanation* to that sub-section says that the trustees of a private trust shall be deemed to be a beneficiary if any income or part thereof from such private trust is enjoyed by him or his heirs or by his family or by the family of his heirs. In law even a private trust has to be treated independently of the founder of the trust or the beneficiaries. The definition of 'person' in section 3 (34) includes a private trust, and, therefore, a private trust as a person is entitled to hold lands upto the ceiling limit prescribed by section 5. This is, however, subject to section 5 (3-A) read with section 6. In cases where the beneficiaries under a private trust can claim any specified share therein, then, that specified share can be included in the holding of the beneficiary. Similarly, where the income of the properties belonging to the private trust is enjoyed by the founder or by his heirs, then the trust or his heirs are treated to be the beneficiaries for purpose of section 3 (3-A) and therefore, to the extent of their benefit the lands belonging to the trust have to be included in the holding of the trustee. But, here the trust deed Exhibit B-1 clearly provides that the entire income has to be utilised for the pooja and neivediam of the idol of Lord Krishna and that the trustees or his heirs are not entitled to utilise any portion of the income from the trust properties for their benefit. Therefore, there is absolutely no possibility of the founder or the heirs of the founder enjoying any benefit from the trust properties. Sections 5 (3-A) and 6 cannot apply for the reason that the founder or his

heirs are not beneficiaries of the trust and they are not entitled to utilise any portion of the income from the trust properties for their benefit. If section 5 (3-A) is to be applied, then the only beneficiary under the trust deed being the idol of Lord Krishna, the trust lands should be taken to belong to the idol. Even then the lands cannot be clubbed with the lands held by the founder as has been done in this case. In this view of the matter the order of the Tribunal cannot be sustained in law. The Civil Revision Petition is therefore allowed and the lands belonging to the trust of an extent of 3.42 standard acres will stand excluded from the holding of the petitioner. There will be no order as to costs.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

T. R. P. Raja Sekara Bhoopathy .. *Petitioner**

v.

Navaneethammal and others .. *Respondents.*

Tamil Nadu City Tenants' Protection Act (III of 1922), section 2 (4)—Tenant—Definition—Successor in interest of tenant entitled to claim benefits under the Act — Tenant not in actual physical possession of land and building not entitled to claim benefits of the Act.

Whatever may have been the position at one time regarding a tenant who holds over after the determination of the tenancy agreement, the law, as it stands now, enables such a tenant also to claim the benefits under the Tamil Nadu City Tenants' Protection Act by reason of the provisions of section 2 (4) (*ii*) (*a*). The question however, is whether actual physical possession of such land and building should be with the tenant, or his successor-in-interest to enable him to claim such benefit. The provision contained in section 2 (4) (*ii*) of the Act speaks of any predecessor in-interest having erected a building on the demised 'land'. That presupposes therefore that a successor-in-interest of the person who erected such building and who continues to be in possession of the land and building would be a tenant within the meaning of this provision. That this is the reasonable conclusion is also made clear by the amendment to the section introduced by Act XXIV of 1973, under which a tenant will also include the heirs of such person as is referred to in sub-clause (*i*) or sub-clause (*ii*) (*a*) or (*ii*) (*b*) and shows that even the heirs of the tenant will be entitled to the benefit of the Act provided that they continue to be in possession of the land and building [*Para.* 4.]

On a fair reading of section 2 (4) (*ii*) (*b*) of the Act, it is clear that such physical and actual possession of the land and building is a *sine qua non* to project the benefits or statutory entitlement under the Act. If that were not the intendment of this piece of legislation, then the very foundation of its objective would be lost, and at the same time it would be a travesty to hold that it is only the original tenant of the vacant site, who put up the structure, who would be entitled to the benefits of the Act and that his heirs, though they may be persons who can be described as tenants would not be entitled to such benefits even though they have parted with possession. The primordial requirement for a tenant to claim the benefits under the Act is that he should be in actual physical possession of such land and building [*Para.* 6.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Small Causes Court, Madras in E.A. No. 37 of 1975—M.P. No. 2200 of 1972 in E.S. No. 67 of 1972.

A. Seshan, for Petitioner.

C. P. Rajagopala Iyengar, for Respondents.

The Court delivered the following

JUDGMENT.—The landlord of property No. 1/75, Chellappa Mudali Street, Perambur Barracks, Madras is the petitioner. The case of the petitioner is that one Ratnavel Chettiar, the predecessor-in-interest of the

*C.R.P. No. 1526 of 1977. 23rd October, 1978.

respondent herein, took on lease the above property (land) belonging to the petitioner in or about 1935 and put up a construction in the said land prior to 1955. The petitioner's further case is that when Rathnavel Chettiar was alive, he executed a fresh lease, Exhibit P-1, dated 9th March, 1960, in and by which Rathnavel Chettiar agreed to pay a rent of Rs. 75 per month against the original rent of Rs. 14 per month which was enhanced from time to time. Thereafter there were certain proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act, between the petitioner and the successors-in-interest of the said Rathnavel Chettiar, and it is stated that in or about 1965, the respondents surrendered a portion of the land, and were prepared to pay a further increased rent of Rs. 100 per month for the remaining portion of the demised land, probably because, as already stated, Rathnavel Chettiar had already put up the superstructure and the respondents wanted to continue as tenants in the property, which is the subject-matter of these proceedings. The complaint of the petitioner is that in or about 1972 the respondents sublet the entire demised land, as well as the superstructure, to the 5th defendant in the ejectment suit filed by the petitioner herein. Coming to know of this the petitioner issued a notice Exhibit P-3, dated 13th March, 1972, terminating the tenancy of the respondents, in so far as the land was concerned, and asking the respondents to surrender possession. The respondents replied claiming benefits under the City Tenants Protection Act. The petitioner was therefore obliged to file the ejectment suit. In that suit the respondent filed an application under section 9 of the City Tenants Protection Act, claiming benefits under the said Act. The trial Court allowed their petition and granted them the benefits under section 9 of the City Tenants Protection Act. The petitioner preferred an appeal to the Appellate Authority (Chief Judge, Court of Small Causes, Madras), who also dismissed the appeal of the petitioner. The appellate authority found that there was nothing to show that there had been a variation in the terms of the tenancy; secondly that there was nothing in the Act which prevented the tenant of a vacant land from subletting the land and that if he sublet the land, he would be disentitled to the benefits under the Act, and, thirdly, that the Act did not contemplate that the person, who continued to be a tenant of the land and who sought for the benefit under section 9 of the Act, should be in actual physical possession of the land. It is as against this order that the present revision petition has been filed.

2. In paragraph 4 of the plaint filed under section 41 of the Presidency Small Causes Court Act, which initiated this (*sic*) discussion between the parties, it is stated as follows:

> "After the death of Rathnavel Chettiar, the defendants 1 to 4 occupied the land, mentioned in the schedule below. Subsequently in proceedings in H.R.C. No. 2457 of 1965, the defendants 1 to 4 agreed to pay the land rent of Rs. 100 per month and also in pursuance of the consent order passed in the aforesaid H.R.C. proceedings a strip of 44′×5′ out of the schedule mentioned land was surrendered to the plaintiff".

Learned counsel for the respondents concedes that there were such proceedings in 1965, that there was a surrender of a portion of the originally demised vacant land and that contemporaneously the rent was also increased to Rs. 100. Therefore the finding of the Court below that there was no evidence to show that there had been a variation in the terms of the tenancy appears to be incorrect. This aspect of the matter has to be further enquired into.

3. The legal contention of learned counsel for the landlord-petitioner is that the tenant in occupation of the vacant land, claiming benefits under the City Tenants Protection Act, should be in actual possession of the land and that he cannot claim such entitlement in cases where he has parted with actual physical possession of the land and building put up by him to a third party. It is common ground in this case that the land and the building has been sublet to the fifth defendant in the main action. Relying upon the provisions of section 2 (4) of the Act the legal contention of learned counsel for the petitioner is that the conclusion of the Appellate Authority that actual physical possession by the tenant is not contemplated,

is against law. Learned counsel for the respondent would, however, say that such actual physical possession of the land and building is not necessary.

4. Section 2 which is the definition section defines 'tenant' in sub-section (4) as follows:

Section 2 (4): 'tenant' in relation to any land—

(i) means a person liable to pay rent in respect of such land, under a tenancy agreement express or implied, and (ii) includes—(a) any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement; (b) any person who was a tenant in respect of such land under a tenancy agreement to which this Act is applicable under sub-section (3) of section 1 and who or any of his predecessors-in-interest had erected any building on such land and who continues in actual physical possession of such land and building, notwithstanding that (1)........ (2)........ (c) the heirs of any such person as is referred to in sub-clause (i) or sub-clause (ii), (a) or (ii) (b); but does not include a sub-tenant or his heirs".

Whatever may have been the position at one time regarding a tenant who holds over after the determination of the tenancy agreement the law as it stands now enables such a tenant also to claim the benefits under the Act by reason of the provisions of section 2 (4) (ii) (a). The question however, is whether actual physical possession of such land and building should be with the tenant, or his successor-in-interest to enable him to claim such benefit. The argument of learned counsel for the petitioner is that it was only Rathnavel Chettiar, who could claim the benefit as a tenant, and not his successors-in-interest or heirs. This is against the very intendment of section 2 (4) (ii) (b). As already excerpted, this provision speaks of 'any predecessor-in-interest having erected a building on the demised land'. That presupposes therefore that a successor-in-interest of the person who erected such building and who continues to be in possession of the land and building would be a tenant within the meaning of this provision. That this is the reasonable conclusion is also made clear by the amendment to the section which was introduced by Act XXIV of 1973, under which a tenant will also include the heirs of such person as is referred to in sub-clause (i) or sub-clause (ii) (a) or (ii) (b). It shows that even heirs of the tenant will be entitled to the benefit of the Act provided that they continue to be in possession of the land and building. I am, therefore, unable to agree with the contention of learned counsel for the petitioner that it was only Rathnavelu Chetti who could claim the benefits under the Act, and not his heirs who are defendants 1 to 4 in the litigation.

5. But, even if defendants 1 to 4 are entitled to protection and the legal entitlement provided under the Act, the question still is whether such persons who are heirs of the tenants so entitled to the benefits under the Act should prove actual physical possession of such land and building and whether such possesssion is a condition precedent to gain the entitlement and the benefits under the Act? On a fair reading of section 2 (4) (ii) (b) of the Act, it is clear that such a physical and actual possession of the land and building is a *sine qua non* to project the benefits or statutory entitlement under the Act. If that were not the intendment of this piece of legislation, then the very foundation of its objective would be lost, and at the same time it would be a travesty to hold that it is only the original tenant of the vacant site, who put up the superstructure, who would be entitled to the benefits of the Act and that his heirs, though they may be persons who can be described as tenants would be entitled to such benefits even though they have parted with possession. I am, therefore, of the view that the primordial requirement for a tenant to claim the benefits under the Act is that he should be in actual physical possession of such land and building.

6. As I said, the Court below, without any detailed discussion about real intendment, objective, meaning and purpose of the Act and its legislative intendment, granted the benefit under the Act to the respondents, on the ground that the Act does not contemplate (i) that, if there is subletting, the tenant would be disentitled to the benefits, and (ii) that the tenant, to claim the benefits

under the Act, should be in actual physical possession of the land and building. As in my view, the matter has to be reconsidered in the light of the observations as above and in the light of the material hereafter to be considered by the Court below, the order of the Court below cannot be sustained. It is accordingly set aside and the subject-matter is remitted to the Court below for re-enquiry and consideration in the light of the provisions of law and the observations made above.

7. The Civil Revision Petition is allowed. There will be no order as to costs.

R.S. ——— *Revision allowed and matter remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.* and *M. A. Sathar Sayeed, J.*

P. Periasami and others .. *Appellants**

v.

P. Periathambi and others .. *Respondents.*

Hindu Law—Self-acquired property of father —Right of undivided son as against divided son—Undivided sons inherit as tenants-in-common—Divided son excluded.

The undivided son's right over the self-acquired property of his father could only be as sapratibandha daya and not as unobstructed heritage or apratibandha daya, since apratibandha daya or unobstructed heritage is traceable to an existing right which in turn is relatable to the right by birth in the Hindu family. The very fact that such a right is dormant during the life time of the father, completely bettressed the same and ultimately the undivided son or sons can only inherit such self-acquired properties of their father as tenants-in-common with no rights of survivorship *inter se* as between them. [*Para.* 21.]

A divided son was excluded in the matter of the share of the self-acquired property of the father whereas the undivided sons take the property not as coparcenors *inter se* with rights of survivorship but only as tenants-in-common. [*Para.* 21.]

As undivided sons had only a bare expectancy and an imperfect or inchoate right over the self-acquired properties of their undivided father, they could only be heirs under Hindu Law to such properties and they could not claim the heritage as if it was apratibandha daya. [*Para.* 22.]

Cases referred to:—

L. Lakshmi Narasamma v. *Rama Brahmam,* I.L.R. (1950) Mad. 1084: (1950) 1 M.L.J. 350: 63 L.W. 258; A.I.R. 1950 Mad. 680; *Vairavan Chettiar* v. *Srinivasa Chariar,* (1921) I.L.R. 44 Mad. 499: 40 M.L.J. 48: A.I.R. 1921 Mad. 1681; *Katama Natchiar* v. *Srimut Rajah Moottoo Vijaya Raghanandha Bodha Gooboo Swamy Peria Odayar Taver,* (1861) 9 Moore I.A. 539; *Balwant Singh* v. *Rani Kishori,* (1898) I.L.R. 20 All. 267; *Jogeswar Narain Deo* v. *Ram Chandra Dutt,* (1896) I.L.R. 23 Cal. 670; *Raja Chelikkani Venkayamma Garu* v. *Raja Chelikkani Venkataramanayyama,* (1902) 29 I.A. 156: I.L.R. 25 Mad. 678: 12 M.L.J. 299; *Mt. Bahu Rani* v. *Rajendra Baksh,* (1933) 60 I.A. 95: 64 M.L.J. 535: A.I.R. 1933 P.C. 72; *Bhagwan Dayal* v. *Reoti Bevi,* (1962) 1 S.C.J. 348: (1962) 3 S.C.R. 440: A.I.R. 1962 S.C. 287; *M. D. R. Ranganatha* v. *M. D. T. Kumaraswami,* I.L.R. (1959) Mad. 298: 72 L.W. 180: A.I.R. 1959 Mad. 253; *Mst. Ram Dei* v. *Mst. Gyarsi,* I.L.R. (1949) All. 160; *Shyam Behari Singh* v. *Rameshwar Prasad,* (1941) I.L.R. 20 Pat. 404: A.I.R. 1942 Pat. 213; *Nana Tawker* v. *Rama Chandra Tawker,* (1909) I.L.R. 32 Mad. 377; *Narasimham* v. *Narasimham,* (1932) I.L.R. 55 Mad. 577: 62 M.L.J. 436: A.I.R. 1932 Mad. 361; *Fakirappa* v. *Yellappa,* (1898) I.L.R. 22 Bom. 101; *Ganesh Prasad* v. *Hazari Lal,* I.L.R. (1942) All. 759; *Peramanayakam* v. *Sivaraman,* I. L. R. (1952) Mad. 835: (1952) 1 M.L.J. 308: A.I.R. 1952 Mad. 419 (F.B.); *Venkateswara Pattar* v. *Mangayammal,* (1935) 69 M.L.J. 410: A.I.R.

* A.C. Nos. 141 and 142 of 1972 and Memo. of Cross Objections. 11th January, 1979.

1935 Mad. 775; *Arunachala v. Muruganatha*, 1953 S.C.J. 707: 1954 S.C.R. 243: (1953) 2 M.L.J. 796: A.I.R. 1953 S. C. 495; *Khadeersa Hajee Bappu v. Puthan Veetil Ayssa Ummah*, (1911) 20 M.L.J. 288: I.L.R. 34 Mad. 511; *Yerukola v. Yerukola*, (1922) I.L.R. 45 Mad. 648: 42 M.L.J. 507: 15 L.W. 595: A.I.R. 1922 Mad. 150; *Sundararajan v. Arunachalam*, (1916) I.L.R. 39 Mad. 159: 29 M.L.J. 793 and 816; *Tirja Bai v. S. Dhundiraj*, (1916) 43 I.A. 151: 31 M.L.J. 455: 4 L.W. 114: A.I.R. 1916 P.C. 104; *Suraj Narain v. Iqbal Narain*, (1913) I.L.R. 35 All. 80 (P.C.); 40 I.A. 40: 24 M.L.J. 345; *Raghavamma v. Chenchamma*, (1964) 2 S. C. R. 933: A.I.R. 1964 S.C. 136; *Puttrangamma v. Rangamma*, (1968) 2 S.C.J. 668: (1968) 3 S.C.R. 119: A.I.R. 1968 S.C. 1018; *M. Girimalappa v. R. Vellappagounda*, A.I.R. 1959 S.C. 906; *Nallesappa v. Mallappa*, (1962) 2 M. L. J. (S. C.) 154: (1962) 2 S. C. J. 589: (1961) 3 S.C.R. 779: (1962) 2 An. W. R. (S. C.) 154: A. I. R. 1961 S. C. 1268; *Kumaraswamy v. Subba Gounder*, (1977) 90 L. W. 583: A. I. R. 1977 Mad. 353; *Kumarappa Chettiar v. Swaminatha Chettiar*, (1919) I. L.R. 42 Mad. 431: 36 M.L.J. 612; *Nirman Singh v. Rudrapratap Narain Singh*, (1926) 51 M. L. J. 836: 25 L. W. 1: 53 I.A. 220: A. I. R. 1926 P. C. 100; *Govindarao v. Rajabai*, (1931) 60 M.L.J. 386: 33 L.W. 439: 58 I.A. 126: A.I.R. 1931 P. C. 48.

Appeals and Memorandum of Cross Objections against the decrees of the Court of the Subordinate Judge, Tiruchirapalli, dated 15th December, 1971 and passed in O.S. Nos. 124 of 1964 and 161 of 1965 respectively.

V. Raman and *P. Navaneethan*, for Appellants.

R. Sundaralingam, R. T. Doraiswami, W. K. Sankaran and *R. Srinivasan*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—As against a common judgment rendered by the Subordinate Judge of Tiruchirappalli in O.S. No. 124 of 1964 and O.S. No. 161 of 1965, the above appeals arise. The plaintiffs in O.S. No. 124 of 1964 are the appellants in A. S. No. 141 of 1972 and the same three plaintiffs as above, who are defendants 4 to 6 in O.S. No. 161 of 1965 are the appellants in A.S. No. 142 of 1972. Both the suits are laid as suits for partition. We shall consider the relative claims of parties in the course of our judgment. In the Court below evidence was recorded in O.S. No. 124 of 1964. The first plaintiff in O.S. No. 124 of 1964 who is the fourth defendant in O. S. No. 161 of 1965, examined himself as P.W. 1. The first defendant in O.S. No. 124 of 1964, who is also the first defendant in O.S. No. 161 of 1965, examined himself as D.W. 1 and the plaintiff, 8th defendant, 13th defendant, 17th defendant and the 18th defendant in O.S. No. 161 of 1965 have examined themselves as D.Ws. 2, 3, 4, 5 and 6 respectively. We shall maintain in these appeals such references to parties for purposes of convenience. The geneological tree showing the relationship of the parties is set out hereunder for ready reference. The description of the parties are as set out in O.S. No. 161 of 1965.

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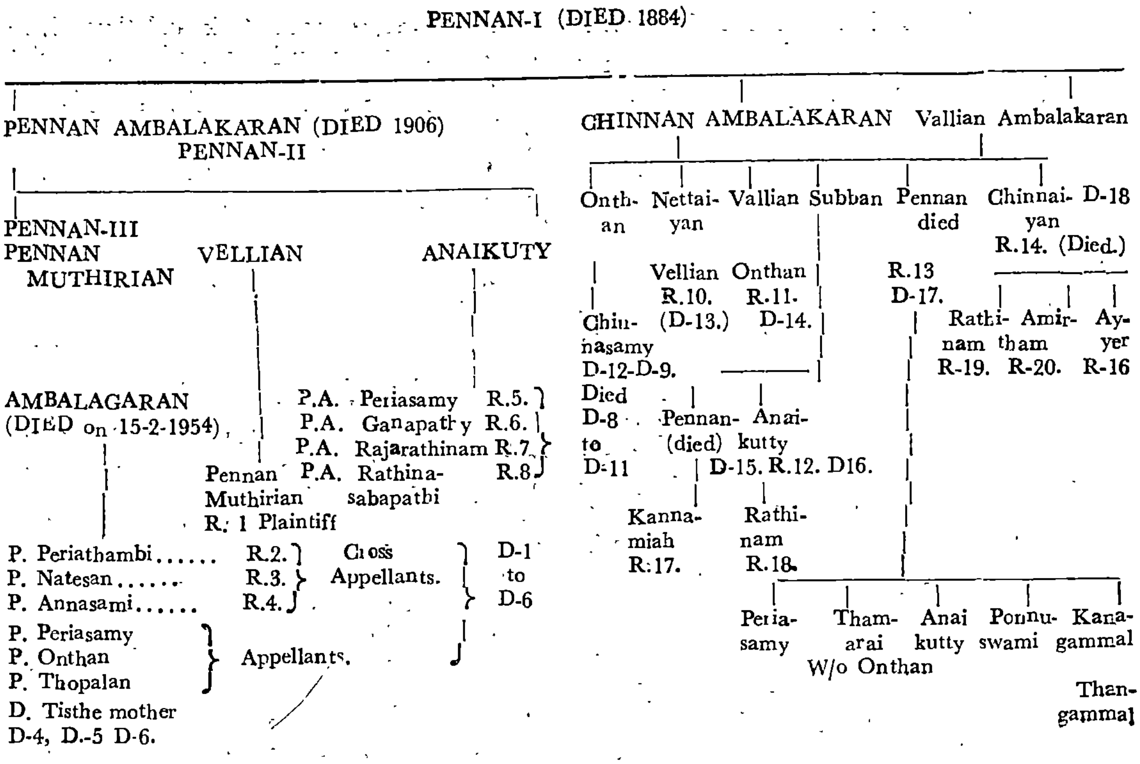

2. The common ancestor was one Ponnan Muthiriar hereinafter referred to as Pennan-I. He had three sons Pennan Ambalakaran, who died in the year 1906, hereinafter referred as Pennan-II and Chinnan Ambalakaran and Vellian Ambalakaran. Pennan-II in turn had three sons, the first son called Pennan Muthiriar Ambalakaran hereinafter referred to as Pennan-III, the second son Vellian and the third son Anaikutti. Pennan-III married twice. Through his first wife Nallangal he had defendants 1, 2 and 3 and through his second wife Periakkal, who was originally the 7th defendant in the suit, and who died pending suit, he had defendants 4, 5, 6, who in turn are the plaintiffs in O.S. No. 124 of 1964. Velliayan had one son, who is the plaintiff. Anaikutti had four sons, who are defendants 8, 9, 10 and 11. The description of the above parties exhausts the line of Pennan-II. We now come to Chinna Ambalakaran, the second son of Pennan-I. He had four sons. The only surviving members in this branch are defendant 12, who also died, in the course of the suit defendant 13, defendant 14, defendant 15, who died pending suit and defendant 16. Vellian Ambalakaran, the third son of Pennan-I, left behind defendants 17 and 18. This defendant 17 died during the pendency of the appeals and his legal representatives have been brought on record. Even so defendant 18 died during the pendency of the appeals and his legal representative have also been brought on record in these appeals. There is no showing in the record as to what were the properties left by Pennan-I. In the schedule to the plaint in O.S. No. 161 of 1965 which is the main suit, the properties left by Pennan-II at the time of his death in 1906 and the properties acquired in the name of Pennan-II from the years 1906-1951 are the subject-matter of this and the other suit O.S. No. 124 of 1964. The properties which were left by Pennan-II are all detailed in Schedules AI, BI, CI, DI and EI appended to the plaint in O.S. No. 124 of 1964. The properties which were acquired in the name of Pennan-III are described in Schedules A, B, C, D to that plaint, Plaintiffs and defen-

dants 8 to 11 in O.S. No. 161 of 1965 make common cause as against defendants 1 to 6 therein. Defendants 4 to 6 in O.S. No. 161 of 1965 who are the plaintiffs in O.S. No. 124 of 1964 are the contesting defendants and hence, they are the appellants in A.S. No. 142 of 1972. Defendants 17 and 18 in O.S. No. 161 of 1965 have filed a memorandum of cross-objections in A.S. No. 142 of 1972. The case of the plaintiffs and defendants 8 to 11 (as already stated they are referred to as such in O.S. No. 161 of 1965) is that all the properties described in Schedules A, B, C, D and the sum and substance of which are contained in the schedules to the plaint in O.S. No. 124 of 1964 are joint family properties in which the branches of Pennan-III, namely, defendants 1 to 6, plaintiffs' branch and Anaikutti's branch, namely, defendants 8 to 11 are entitled to equal shares. This is resisted by defendants 1 to 6.

3. The properties in dispute are mostly Nanja and Punja lands and they are situate in four villages. The A Schedule properties are in Mullikkarumbur Village, B Schedule properties in Kulumani village, the plaint C Schedule properties in Kudalaipatti village and the D Schedule properties in Koppu North village and E Schedule in Koppu South village. The case of the plaintiffs is that Pennan-II who died in the year 1906, left considerable properties, which according to the plaintiff, are his own self-acquisitions and that they are comprised in the suit Schedules A to D and that after the death of Pennan-II, Pennan-III, the plaintiff's father and the father of defendants all remained as members of a Hindu undivided family and that Pennan-III was the manager thereof and that Pennan-III with the surplus income from the family properties acquired various properties but in his name set out in Schedules A to D and that Pennan-III had no independent means of income other than joint family income and that therefore all such properties acquired and left by Pennan-II and all those properties added to them by Pennan-III when he was manager of the joint family are all partible properties and that the plaintiff would be entitled to a one-third share therein. The alternative case is that even if the properties standing in the name of Pennan-III are to be considered as his own properties, he threw them into the common stock and thus, there was a blending of such properties with joint family properties and that Pennan-III, Vellian, the plaintiff's father and Anaikutti, the father of defendants 8 to 11 treated such blended properties as joint family properties and in that sense also, he was entitled to his legitimate share.

4. We have to note at this stage a second set of pleadings and a different case which is commonly fought out as between the plaintiff and defendants 1 to 11 on the one hand and defendants 12 to 18 on the other. The case of the plaintiff is that defendants 12 to 18 have no interest in the suit properties at all. To further his contention a common cause is made through the fourth defendant that Pennan-I died about 75 years ago and he left very little properties which did not produce any income and that after the death of Pennan-I, Pennan-II left the village and his two brothers Chinnan and Vellian and what little properties Pennan-I left were taken over by Chinnan and Vellian and therefore, there was a severance in status and in enjoyment between Pennan-II and his two brothers and therefore the branch of Chinnan and Vellian now represented by defendants 12 to 18 have no interest in the suit properties at all. On the other hand, defendants 17 and 18, who resisted such a stand would aver that there was no division or partition as between Pennan-II and Chinnan and Vellian and that the family being an agricultural family, Pennan-II continued to be the manager and notwithstanding the fact that each of the branches grew from time to time by the birth of sons and grandsons, there was no partition at all and the properties acquired by Pennan-II in the four villages referred to in the plaint and the later accretions should be treated as joint family properties in which they should be deemed to be the sharers. They admit that defendants 17 and 18 were in possession and enjoyment of some properties in some of the villages referred to above and, that, therefore, they were entitled to a one-sixth share each, as their father Vellian was entiled to a one-third share therein. They would allege that the common cause made by the plaintiff and other defendants in the action that Pennan-II left the village leaving his two brothers Chinnan and Vellian and

the available family properties left by Pennan-I, is not true. Ultimately, defendants 17 and 18 contended that the lands in their possession should not be disturbed and even if a decree for partition, is made, accepting their contentions, those lands should be allotted to them. As already stated, the common cause made by the contesting parties was that the only properties left by Pennan-I were taken over by his two sons, Chinnan and Vellian and that, therefore, defendants 17 and 18 have no more surviving interest or title in the other properties of Pennan-II. We may at once state that in so far as defendant 13 is concerned, he has filed a memo. of compromise and adjusted his claim with the appellant and respondents 1 to 8. It is recorded.

5. We shall presently consider whether the claim of the 17th and 18th defendants, whose legal representatives are now before us and who have filed cross-objections in A.S. No. 142 of 1972, questioning the finding of the trial Court that Pennan-II left his father's properties (Pennan-I's) and disclaimed totally any interest therein and made it over to his other two brothers to be enjoyed by them absolutely, is sustainable or not. No independent case was put forward by defendants 13 to 16. Defendant 12 died and his legal representatives were brought on record.

6. We shall now take up the main contest as between the plaintiff and defendants 8 to 11 on the one hand and defendants 1 to 6 on the other. It is common case of parties that Pennan-II when he died in or about 1906 left the properties in the four villages as above and those properties should be taken to be his self-acquisitions and not properties imprinted with the character of ancestral properties. The case of the plaintiff is that after the death of Pennan-II, Pennan-III the plaintiff's father and the father of defendants 8 to 11 constituted members of an undivided Hindu family and improved the same by purchasing the properties in Pennan-III's name and that therefore, they were entitled to a one-third share therein.

7. The fourth defendant who sails along with his natural brothers defendants 5 and 6, would say that his step-brother, the first defendant herein is the cause of this litigation; He would deny that there were any properties of Pennan-II which formed the nucleus for Pennan-III. The specific case of the fourth defendant is that after the death of Pennan-II, Pennan-III and his two brothers Vellian and Anaikutti enjoyed their share in the self-acquisitions of their father Pennan-II separately and that they have been purchasing properties in their own right and to the knowledge of each other and that after the death of Pennan-II there was a division between the three brothers, namely, Pennan-III and his two brothers and that by their conduct they made it known that they were divided members. The further case is that Pennan-III was independently securing lease of lands and borrowing moneys from third parties and it was this which formed the foundation for the various acquisitions made by Pennan-III in his own name. He would also rely upon a will executed by Pennan-III, in and by which he left certain properties to his sons, defendants 1 to 6 and also to his two wives. There are positive indicia that the properties which are the subject-matter of these two suits are his self-acquired properties and that the suit O.S. No. 124 of 1964 was filed against the step-brothers, namely, defendants 1 to 3 for partition based upon the two wills executed by Pennan-III on 19th July, 1950 and 14th November, 1953. The fourth defendant incidentally states that he has paid-off a large portion of the debt of Pennan-III besides paying income-tax, which in any event, should be paid over to him in case the plaintiff's contention is upheld. He also sets up an independent claim with regard to item V in the A schedule property and says that it is his own property. Defendants 8 to 11 support the case of the plaintiff.

8. We are not traversing the pleas raised by defendant 13 as his claim has been adjusted in this appeal.

9. On the above material pleadings the following issues have been framed and the suits were tried together as per the directions of this Court.

1. Whether Pennan Ambalagaran and his three brothers constituted a Hindu joint family as alleged?

2. Whether the three sons of Pennan Ambalagaran after his death remained as

members of the joint family as alleged in the plaint or whether the three sons separately got and separately enjoyed their shares in the acquisitions of the father?

3. Whether the properties purchased by Pattaidar Pennan Muthiriar since 1905 are joint family properties as contended by the plaintiff?

4. Whether 35 cents in item 5 of A schedule is the exclusive property of the 4th defendant?

5. Whether Akkandi was validly married to Chinnan Ambalagaran, if not whether defendants 12 to 16 have any rights in the family?

6. What provisions have to be made for discharging the debts contracted by Pattaidar Pennan Muthiriar?

7. Whether the 4th defendant is entitled to be paid the amounts paid by him for discharge of his father's debts and the amounts paid towards agricultural income-tax?

8. Whether the suit had been properly valued and proper court-fee paid?

9. To what shares if any are the parties entitled and in which items of the suit properties?

10. Whether the defendants 1 to 6 and their father have prescribed title by adverse possession?

11. To what relief?

10. The learned Judge held that Pennan-III and his two brothers remained as members of a joint family as alleged in the plaint and that the properties purchased by Pennan-III and the properties purchased by the fourth defendant described as item 5 in the A schedule are all joint family properties and that the suit properties are not the self-acquisitions of Pennan-III. There was no serious argument on the finding that item 5 in the A schedule standing in the name of the fourth defendant is joint family property. We, therefore, confirm this finding of the trial Court. After answering the other issues, the trial Court decreed both the suits. Hence, the appeal A.S. No. 142 of 1972 by defendants 4 to 6 and by them as plaintiffs in O.S. No. 124 of 1964, the Appeal A.S. No. 141 of 1972.

11. In order to set at rest the controversy whether Pennan-II did have at the time of his death any ancestral properties which he obtained from Pennan-I, it would be convenient at this stage to deal with that part of the dispute as between the branch of Pennan-II and the two other sons of Pennan-I, who figured as defendants 12 to 18 in the suit. We have already referred to the fact that defendant 13 after adjusting his differences filed a memorandum of compromise and therefore, the contest between defendant 13 on the one and the members of the branch of Pennan-II may be closed. But the controversy as between the above breach of Pennan-II and defendants 12 and 14 to 18 survives. Excepting for the contest by defendants 17 and 18, there was no independent argument on the side of defendants 12 and 14 to 16. In their memorandum of cross-objections, the legal representatives of defendants 17 and 18 question the finding of the trial Court which held against them. The cross-objectors' case is that the lower Court acted merely on the hearsay of the plaintiff and some of the defendants, who had no personal knowledge about the transactions and events. The sheet anchor of their defence is that as there is no clinching evidence to prove that there was a division in status or division by metes and bounds of the family properties as between Pennan-II and his brothers Chinnan and Vellian, the case of defendants 17 and 18 now pursued by their legal representatives is that they, as the heirs, who are alive in the branch of Vellian, would be entitled to a one-third share in the suit properties. They would also make capital of the fact that they have been made parties to this action by the plaintiff and as it is the common case that their ancestors were in possession of some lands (not identified) in two out of the four villages in which the joint family properties are situate they should be considered as undivided members of a Hindu Joint family in the light of alleged evidence of such possession of lands which might have originally belonged to Pennan-I. They produced Exhibits B-143 to B-163 and B-233 to B-254. They are all kist receipts evidencing payment of kist by the 17th defendant. It is also brought out that the 17th defendant in his own right, mortgaged the lands in Mudalai-

patti Village under Exhibit B-230 and that the legal representatives of the 17th defendant had no discharge the same. On the strength of such possession of lands, it is said that there was no division in the family at all. Referring to the evidence of D.W. 2, who is the plaintiff who admits such enjoyment of Mudalaipatti lands by the 17th defendant, since Pennan-II let them to his brothers, they would point out what the plaintiff has no personal knowledge as to whether Pennan-II and his brothers Chinnan and Vellian were divided or not. They would refer to the alleged vague evidence of P.W. 1 who is the fourth defendant in O.S. No. 161 of 1965 who also speaks to some hearsay evidence to the effect that Pennan-III told him that lands of the family were left over for the benefit of Chinnan and Vellian. Specific reference is made to the fact that P.W. 1 is also not aware of the date or the mode of division of Pennan-I's lands. D.W. 5 who is the 17th defendant as well as D.W. 6 would only refer to their separate enjoyment of the Mudalaipatti lands and would assert that the mere fact that they were in possession of some properties of Pennan-I cannot lead to the irresistable inference that the ancestors of defendants 12 to 18 should be deemed to have separated themselves from Pennan-II. In the end however they would pray that defendants 17 and 18 together should be granted a decree for a one third share in the entirety of the admitted joint family properties which were in the possession of Pennan-II at the time of his death or in any event, the properties in the possession of defendants 17 and 18 respectively be sustained without themselves being deprived of the same.

12. In answer to this claim in the cross-objections, the contention of the other party contesting the same which include the plaintiff and defendants 1 to 11 is as follows:

13. Pennan-I as per the record left only two items of properties in Etteri Village as is seen from pattas marked as Exhibits D-1 (*a*) and D-1 (*b*) in an earlier action between the parties in O.S. No. 13 of 1946 on the file of the Sub-Court, Tiruchi. Besides Pennan-I had a one-eighth share along with seven others in another property as is seen from Exhibit B-271 and both the above lands were dry lands of an extent of 12 to 16 acres and that as per Exhibit A-196 which was the written statement filed by Pennan-III in an earlier action, the small extent of lands held by Pennan-I were unproductive dry lands and its income could not have exceeded more than Rs. 50 per annum. A reference is also made in the evidence of Pennan-III who was examined in O.S. No. 13 of 1946. Pennan-III reiterated in the above suit that the entire lands left by Pennan-I, were cultivated by his uncles Chinnan and Vellian, the ancestors of defendants 17 and 18 and that Pennan-II was independently exerting himself by taking on lease lands belonging to third parties besides trading in grains and paddy. The ancestors of defendants 17 and 18 were parties to that suit and never contradicted the evidence of Pennan-III. In fact in that suit the Court accepted the case of Pennan-III and impliedly negatived the claim of Vellian and Chinnan over the other properties acquired by Pennan-II. A reasonable inference from the conduct of the ancestors of defendants 17 and 18 is that they never claimed any interest in the properties acquired by Pennan-II in his own right and *a fortiori* therefore, they cannot claim any interest in the properties of Pennan-III. We are unable to accept the interested testimony of D.W. 5 who is the 17th defendant that his father gave all his earnings to Pennan-II. He has no personal knowledge about it. Though he is aged 85 years, he would only speak by himself. He has not even seen Pennan-II and he is not aware personally whether his father gave any money to Pennan-II. Having regard to the fact that D.W. 5 himself would admit that the so-called ancestral lands which came into the lands of Pennan-II were 12 acres of punja lands and that they were not cultivable unless there was rain and as there was no corroborative acceptable evidence the case of defendants 17 and 18 that all the properties held by Pennan-II and later in the possession of Pennan-III and others should be deemed to be joint family properties appears to be a tall and unacceptable claim. It is not known as to why the 17th defendant who was a party to O.S. No. 13 of 1946 did not give evidence in that suit. The 18th defendant who is younger than him attempted to speak in that case. His

evidence was therefore, rightly disbelieved. One other factor which is relied upon by the trial Court and which is found on the record is that after Pennan-II's death, it was only Pennan-III and his brothers who sought for succcession certificate to collect the outstandings due to Pennan-II and even at that time neither Vellian nor Chinnan joined them or laid any claim thereto.

14. One other factor also looms large though incidentally in this case. The judgment in O.S. No. 13 of 1946 on the file of the Court of the Subordinate Judge, Tiruchirapalli, was the subject-matter of appeal to the District Court in A.S. No. 883 of 1947. At the appellate stage, the suit was withdrawn with liberty to the parties to file a fresh suit. Defendants 17 and 18 did not file any such suit but were brought to the scene of action only by the present plaintiff, who so impleaded them so as to obtain an adjudication of his rights in their presence. The inaction of defendants 17 and 18 lends support to the conclusion that Pennan-II left the ancestral lands with his brothers and was earning by himself without prejudice to the then joint family properties and that all the acquisitions made by him later should be deemed to be Pennan-II's properties in which neither the branch of Chinnan or Vellian including defendants 17 and 18 can claim any share.

15. Regarding the lands in Mudalaipatti Village, they are the properties purchased by Pennan-III after the death of Pennan-II, under Exhibit A-55 dated 6th September, 1942. We have already held that the cross-objectors cannot project any right to the properties acquired by Pennan-II. Defendants 17 and 18 and their legal representatives before us want to take advantage of the fact that the lands were leased back by Pennan-III to them. The factum of lease was accepted by a competent Court in O.S. No. 13 of 1946. In fact, a similar claim made by defendants 17 and 18 as is made now, over the Mudalaipatti lands was negatived. As Pennan-III himself purchased the lands in 1942, their possession pursuant to a lease granted by Pennan-III thereafter could not be for a period of 60 years as claimed by them. Rightly, therefore, the trial Court discountenced such a plea also. It is, therefore, clear that Mudalaipttai lands are not ancestral lands and the case of the defendants that they paid the kists for the land in the absence of a patta of such lands in their names is absolutely a false claim and has to be rejected. The appellants have filed the kist receipts and D.W. 1 in his evidence has stated that the patta for all the lands including Mudalipatti lands stood in the name of Pennan-III and that they were the owners thereof. The mere fact that Pennan-III allowed defendants 17 and 18 to cultivate the lands purchased by him, under Exhibit A-55 and which was also referred to by Pennan-III in O.S. No. 13 of 1946 does point out that the case of defendants 17 and 18 wherein they project a claim over the lands at Mudalaipetti is untrue. In fact, defendants 17 and 18 themselves admit that they were cultivating the land only after it was purchased by Pennan-III. They could not have, therefore, perfected their title to it by adverse possession. The fact that defendants mortgaged the Mudalaipatti land under Exhibit B-230 cannot improve the situation. He did not have the original document of title of Exhibit A-55. That was produced by the appellants in this present suit and marked as such. Obviously defendants 17 and 18, taking advantage of their possession which was by itself permissive contrived to mortgage the property. The recitals therein belie the case of defendant 17. He gave an indemnity as to title and would say that himself and his sons are ancestrally enjoying the lands. Even as regards the other mortgage as Exhibit A-232, we are persuaded to say that the transaction is not a *bona fide* one. Without being in possession of the title deed and without the challenging co-parcener establishing that the mortgaged property was joint family property, the claim for adverse possession is absolutely a misconceived one. It may be that the mortgagee who advanced moneys under the two mortgages Exhibits B-230 and A-232 might have filed a suit and obtained a decree. But it is on a misrepresentation that the mortgage was created and a decree has been suffered. That cannot be taken advantage of by a person who has no right, title or interest over the same. We agree with the trial Court that defendants 17 and 18 were only in permissive possession of such lands and in the

absence of any acceptable material evidencing title in them over such lands, the cross-objections are without any substance and they are therefore, dismissed.

16. All parties have agreed that the properties left by Pennan-II were his self-acquired properties. Obviously, this contention is based on the proved fact that Pennan-II left the small extents of lands which he got from his father Pennan-I for the benefit of his two brothers Chinnan and Vallian and was seeking his own livelihood and purchased properties by exercise of his volition, without prejudice to any ancestral property in his hands. We shall therefore, proceed on the agreed assumption that all the properties left by Pennan-II were his self-acquisitions and at the time of his death in 1906, Pennan-III, Vellian, father of the plaintiff at Anaikutti, father of defendants 8 to 11 were his undivided sons. The primary question noted before us is:

> "When a Hindu father, who is joint and undivided with his sons at the time of his death dies, leaving self-acquired properties of his, in what manner the sons who continued to be joint with him take that property?
>
> Is it joint family property in their hands with all the incidents attached to such a concept or do they take it as tenants in common?

17. In spite of the enlightened cobwebs of orthodox Hindu Law having been shed by the introduction of the statute law in Hindu Succession Act of 1956, yet the law relating to joint family which is a peculiar doctrine amongst Hindus still shoots posers which are not easy of solution. The peculiarity in Hindu Law is that the kith and kin of an owner of property acquired an interest in such property even before his demise. This is adumberated in the principle of right by birth. Daya (heritage) in Hindu Law from hoary times has been classified under two heads *apratibandhadaya* and *Sapratibandha daya* which expression to the extent possible has been translated in English as 'unobstructed heritage' and 'obstructed heritage'. Unobstructed as the term itself connotes is an interest *in praesenti* and such an interest is attributed to his birth in the family. The son, grandson and great grandson have such vested rights by birth in the property of their father and their *pitha maha* (father's father) and they acquired an interest by birth in such property of their father and grandfather. The question is, if the property left by the father is his swayarjita or self-acquired property, does the son acquire an interest in it by birth and incidentally therefore the question arises if there are more than one son, who, at the time of the death of the father, are undivided, do they inherit the same or do they collectively take the property by survivorship by reason of their birth and hold the same as joint family property amongst themselves. The Law of Succession amongst the Hindus, particularly, with reference to the joint family property follows the nature of the particular property in question and the status of the person is sometimes not material for consideration. The question whether the undivided sons of a Hindu father take his self-acquired property as tenants-in-common or as joint tenants with rights of survivorship has to be necessarily decided by determining the nature and character of the property taken by them in their hands. Vide *L. Lakshmi Narasamma* v. *Rama Brahmam*[1]. We have referred to two kinds of Daya. The first heritage is relatable to the right by birth which in Hindu Law is available to a son, son's son and the son's son's son. In the second kind of Daya namely, *sapratibandha daya,* the existence of the owner is a fundamental obstruction and the right of inheritance accrues only on the death of the owner. (Vide *Lakshmi Narasamma* v. *Rama Brahmam*[1]). If therefore, the law of succession amongst Hindus would follow the nature of incidence of the particular property, the necessary weightage has to be given and a dichotomy created in the case where undivided sons of a father seek an answer to the quary whether they inherit the same or succeed to the same. If they inherit the same, then it would be a case of *sapratibandha daya*. If they survive to the same as members of a co-parcenary, it would be a case of *apratibandha daya*. This distinction, in our view, has to be borne in mind before we answer the question first formulated by us.

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1. I.L.R. (1950) Mad. 1084 : (1950) 1 M.L.J. 350 ; 63 L.W. 258 ; A.I.R. 1950 Mad. 680.

18. Mr. Kesava Iyengar in a lucid exposition of the intricacies of law of joint family separately relied upon the decisions reported in *Vairavan Chettiar* v. *Srinivasa Chariar*[1], *Katama Natchar* v. *Srimut Rajah Moottoo Vijaya Raghanandha Bodha Gooboo Swamy Peria Odayar Taver*[2], *Balwant Singh* v. *Rani Kishori*[3], *Jogeswar Martin Leo* v. *Ram Chandra Dutt*[4], *Raja Chelikani Venkayamma Garu* v. *Raja Chelikkani Venkataramanayamma*[5], *Mt. Bahu Rani* v. *Rajendra Baksh*[6], *Bhagwan Dayal* v. *Reoti Devi*[7], *Lakshminarasamma* v. *Rama Brahmam*[8], *M. D. R. Ranganatha* v. *M. D. T. Kumaraswami*[9]. Contending equally with falicity and force, Mr. M. R. Narayanaswamy would strongly rely upon a Full Bench decision reported in *Mst. Ram Dei* v. *Mst. Gyarsi*[10], and the ratio in *Shyam Behari Singh* v. *Rameshwar Prasad*[11], *Nana Tawker* v. *Rama Chandra Tawker*[12], *Narasimham* v. *Narasimaham*[13], *Fakirappa* v. *Yellappa*[14], *Ganesh Prasad* v. *Hazari Lal*[15].

19. Whilst, Mr. Kesava Iyengar would contend that Pennan-III and his brothers who were admittedly joint with their father Pennan-II on the date of his death, acquired those properties of Pennan-II as tenants in common, Mr. M. R. Narayanaswamy's contention is that they took it as joint tenants with rights of survivorship *inter se*.

1. (1921) I.L.R. 44 Mad. 499 : 40 M.L.J. 481 A.I.R. 1921 Mad. 168 (F.B.).
2. (1861) 9 M.I.A. 539.
3. (1898) I.L.R. 20 All. 267.
4. (1896) I.L.R. 23 Cal. 670.
5. (1902) 29 I.A. 156 : I.L.R. 25 Mad. 678 : 12 M.L.J. 299.
6. (1933) 60 I.A. 95 : 64 M.L.J. 555 : A.I.R. 1933 P.C. 72.
7. (1962) 1 S.C.J. 348 : (1962) 3 S.C.R. 440 : A.I.R. 1962 S.C. 287.
8. (1950) 1 M.L.J. 350 : I.L.R. (1950) Mad. 1084: A.I.R. 1950 Mad. 680.
9. I.L.R. (1959) Mad. 298 : 72 L.W. 180 : A.I.R. 1959 Mad. 253.
10. I.L.R. (1949) All. 160.
11. (1941) I.L.R. 20 Pat. 404 : A.I.R. 1942 Pat. 213.
12. (1909) I.L.R. 32 Mad. 377.
13. (1932) I.L.R. 55 Mad. 577 : 62 M.L.J. 436 : A.I.R. 1932 Mad. 361.
14. (1898) I.L.R. 22 Bom. 101.
15. I.L.R. (1942) All. 759.

20. For a digression which is necessary in this case, we have to remember the established rule of *stare decisis* which compels us to abide by well-known precedents of the past instead of venturing to alter the same, Raghava Rao, J., in *Peramanayakam* v. *Sivaraman*[1], while dealing with the rule explained it thus:

> "The rule of '*stare decisis*' only means that where a rule has become settled law it is to be followed although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason is wanting, or although the principle and the policy of the rule may be questioned."

It is also a guilding rule to Courts that when an ancient precedent which has stood the test of times for over fifty years is available, and that too in the nature of a Full Bench decision of a particular High Court that should be the guiding factor to the Judges sitting in a Division Benchq and *a fortiori* to a single Judge. Preferring the ratio of a Full Bench decided by a different High Court may border on impropriety. This rule of prudence would naturally keep the scales of justice in the same Court steady and unwavering and make it not susceptible to private sentiments of a Judge, human as he is. We have referred to the doctrine of *stare decisis* perfunctorily, since we are constrained to respect the decision of the Full Bench of the Madras High Court reported in *Vairavan Chettiar* v. *Srinivasa Chariar*[2], rather than to accept the principle laid down by the Full Bench of the Allahabad High Court in *Mst. Ram Dei* v. *Mst. Gyarsi*[3], which is diametrically opposite to the ratio in the first cited Full Bench decision. We shall now proceed to give our reasons.

21. Mitakshara explains the two terms *apratibandha daya* and *spratibandho daya* thus:

> "The wealth of the father or of the paternal grandfather becomes the property of

1. I.L.R. (1952) Mad. 835 : (1952) 1 M.L.J. 308 : A.I.R. 1952 Mad. 419 (F.B.).
2. (1921) I.L.R. 44 Mad. 499. : 40 M.L.J. 481,
3. I.L.R. (1949) All. 160.

his sons or of his grandsons, in right of their being his sons or his grandsons; and that is an inheritance not liable to obstruction. But property devolves on parents or uncles, brothers, or the rest, upon the demise of the owner, if there be no male issue; and thus the actual existence of a son, and the survival of the owner are impediments to the succession; and on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction."

It is undisputed, since it is not disputable, that the father in so far as his own property is concerned, has an unrestricted power to alienate the same either testamentarily or otherwise, the son can project only a right in the nature of expectancy in the father's self-acquisitions. It is in the nature of a *spes successionis*. To adopt with respect the enlightened observations of Lord Macnaghten in *Raja Chelikani Venkayyamma Garu* v. *Raja Chelikani Venkataramanayamma*[1].

> "He is his father's son and if his father does not dispose of it, it will come to him, but is it anything more than a spes."

The Allahabad High Court in another Full Bench decision reported in *Ganesh Prasad* v. *Hazari Lal*[2] had to consider a similar question. They observed:

> "On the death of a Hindu leaving self-acquired property the undivided sons succeed to such property to the exclusion of the divided son under the Mitakshara Law."

Two of the learned Judges expressed the view that the undivided sons of a Hindu succeed to the self-acquired property of their father by inheritance and not by survivorship. There was, of course, in the very same judgment a contrary view expressed by a learned single Judge on the above question. In fact, one of the Judges of the Allahabad High Court referred to *Venkayamma Garu* v. *Venkataramanayamma*[1], and made a pointed reference to the observation of the Law Lords in that case which reads that "the members of a joint family who succeed to self-acquired property, take it jointly" and the learned Judge said that this is the same thing as saying that they take the property by survivorship. The observations of Lord Justice Turner in *Katama Natchiar* v. *The Rajah of Shivaganga*[1], about the law of partition shows that as to the separately acquired property of one member of a Hindu family, the other members of the family have neither community of interest nor unity of possession. Though the above observation might not have been quite necessary for the decision in the above case (*Katama Natchiar's case*[1]), yet such observations which are in the nature of valuable propositions, though *prima facie obiter dicta* in nature, carry great weight. The Full Bench of the Allahabad High Court in *Mst. Ram Dei* v. *Mst. Gyarsi*[2], was of the view that the self-acquired property of a Hindu father which his sons, who were joint with him, take on his death, was in their hands joint family property and as between the sons and their descendants, it was subject to all the incidents of a coparcenary is a dictum which we, with great respect, are unable to follow having regard to the contrary view expressed by our Court in *Vairavan Chettiar* v. *Srinivasachariar*[3]. With great respect to the learned Judges, who presided over the case in *Mst. Ram Dei* v. *Mst. Gyarsi*[2], even the quotations in Mitakshara referred to by them do not fully support the conclusion. Dr. Sen who pioneered the said view accepted by the learned Judges in the Full Bench case of *Mst. Ram Dei* v. *Mst. Gyarsi*[2], is constrained to observe thus:

> "My conclusion, than, is, that the right which a son acquires by birth in his father's property is not limited to ancestral property alone, but extends over the entire property of the father, *although the extent of the right is not everywhere the same but depends on the nature of the property.*"

The last portion of the opinion of Dr. Sen underlined by us creates doubt whether the

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1. (1902) 29 I.A. 156: 12 M.L.J. 299: I.L.R. 25 Mad. 678.
2. I.L.R. (1942) All. 759.

1. (1861) 9 M.I.A. 539.
2. I.L.R. (1949) All 160 (F.B.).
3. (1921) I.L.R. 44 Mad. 499: 40 M.L.J. 481.

principle propounded is of universal application. Even the learned author Mayne touching on this aspect is rather vascillating. He would say:

> "The son's right by birth does not, therefore, extend to his enforcing a partition or interdicting an alienation of his father's property. The right, however, remains a real birthright, though dormant, and enables the son to succeed to the property by survivorship as *apratibandha daya.*"

With utmost respect to the learned author, we are still at pains to logically adopt the same for the reason that the son has no justifiable right over the self-acquired property of his father when he is alive to seek for a share therein or interdict the father from in any way dealing with it to his prejudice. So long as such a right of the son revolves round an air of expectancy rather than reality, we sustain the view that the undivided son's right over the self-acquired property of his father can only be as *sapratibandha daya* and not unobstructed heritage or *apratibanda daya,* as *apratibandha daya* or unobstructed heritage is traceable to an existing right which in turn is relatable to the right by birth in the Hindu family. The very fact that such a right is dormant during the life time of the father, completely buttresses the same and ultimately the undivided son or sons can only inherit such self-acquired properties of their father as tenants in common with no rights of survivorship *inter se* as between them. The principle of joint tenancy with rights of survivorship *inter se* is unknown to Hindu Law except in the case of joint property of an undivided family governed by Mitakshara Law which under that law passes by survivorship. Vide *Jogeswar Narain Deo* v. *Ramchandra Dutt*[1], *Mt. Bahu Rani* v. *Rajendra Baksh*[2], and *Bhagwan Dayal* v. *Reoti Devi*[3]. It is no doubt true that if a father dies leaving separate property and also leaves sons some of whom are divided from him and some remained joint with him, the undivided sons would exclude the divided sons, in the matter of taking the self-acquired property of the father. (See *Nana Tawker* v. *Ramachandra Tawker*[1], *Narasimha Rao* v. *Narasimhan*[2], *Fakirappa* v. *Yellappa*[3], *Ganesh Prasad* v. *Hazari Lal*[4].) But that does not necessarily mean that the undivided sons take the self-acquired property of their father as joint tenants. A divided son severs his connection with the family and particularly, his father for all purposes. He takes his share in the ancestral property if any and is not mindful of the expected share of his in the self-acquisitions of the father. At the time when he left the family and divided himself he had only a right of expectancy in his father's absolute properties. He voluntarily cut off that knot of expectancy and was prepared to surrender it, even though it was not in reality a ripe right at that time. This is the basic truth behind the accepted principle that a divided son cannot claim any right in the self-acquired property of the father along with the undivided brothers of his. This is understandable because no man can help one who does not want to help himself. The divided son cuts himself off from the family and he cannot re-enter the same merely for purposes of aggrandizing himself to the prejudice of those undivided sons who knit themselves with the father in filial bondage. We are unable to agree with Mr. M. R. Narayanaswamy that as continuance in the coparcenary is the *sine qua non* to enable the undivided son to take the self-acquired property of the father of the exclusion of the divided son, they should necessarily take it as coparceners and not as tenants in common. We have already categorically expressed that the law of succession amongst Hindus follows the nature of the particular property in question and the status of the person is immaterial. It, therefore, follows that the argument of Mr. Narayanaswami that is only their status at the time of the father's death that would decide the character of the estate is not acceptable to us. There is nothing inconsistent in our view to say that a divided son is excluded in the matter of the share of the self-acquired

1. (1898) I.L.R. 25 Cal. 670.
2. (1933) 60 I.A. 95: 64 M.L.J. 555: A.I.R. 1933 P.C. 72.
3. (1962) 1 S.C.J. 348: A.I.R. 1962 S.C. 287 at 343.

1. (1909) I.L.R. 32 Mad. 377.
2. (1932) I.L.R. 55 Mad. 577: 62 M.L.J. 436: 35 L.W. 475: A.I.R. 1932 Mad. 361.
3. (1898) I.L.R. 22 Bom. 101.
4. I.L.R. (1942) All. 759.

property of the father whereas the undivided sons take the property not as coparceners *inter se* with rights of survivorship but only as tenants in common. No doubt, Varadachariar, J., in *Venkateswara Pattar* v. *Mankayammal*[1], speaking for a Division Bench took a view that according to the scheme of Mitakshara Law, the succession of sons even in respect of their father's self-acquired properties is by survivorship. Though this decision was rendered 14 years after the decision of a Full Bench of our Court in *Vairavan Chettiar* v. *Srinivasachariar*[2], yet this was not referred to. But on the other hand A. S. Panchapakesa Ayyar, J., speaking for the Division Bench in *M. D. R. Ranganatha* v. *M. D. T. Kumaraswami*[3], adopted the dictum in the Full Bench in *Vairavan Chettiar* v. *Srinivasachariar*[2], and observed:

> "The Full Bench decision was delivered in 1921 and has never been dissented from by any decision of this Court or any other Court till now much less overruled by the Supreme Court or the Privy Council. It has stood the test of 37 years and we are satisfied that it does not deserve to be referred to a fuller Bench especially as we have absolutely no doubt regarding its correctness".

What is, however, urged before us is that the decision of the Full Bench of the Allahabad High Court in *Mst. Ram Dei* v. *Mst. Gyarsi*[4], followed the ancient text. As a matter of fact, Kaul, J., while speaking for the Full Bench in the Allahabad High Court said:

> "that the proposition that the sons of a Hindu though joint with him, acquired no interest in his self-acquired property by birth is opposed to the express text of the Mitakshara and other Hindu books".

Our answer to this is found in the forcible observations of Rajamannar, CJ., in *Lakshmi Narasamma* v. *Rama Brahmam*[5]:

> "However deplorable this may be we are at a stage when we are not free to go back to the law as enunciated and discussed in ancient books of Hindu Law, untrammelled by judicial decisions. There can be no doubt that as between the original text and a decision of the Judicial Committee we cannot choose to follow the former and refuse to be bound by the latter".

We add we cannot choose to follow the ancient text as was done by the Allahabad High Court and refuse to be bound by a Full Bench decision of our Court reported in *Vairavan Chettiar* v. *Srinivasachariar*[1].

22. We have thus to fall back on the decision of the Full Bench of our Court in *Vairavan Chettiar* v. *Srinivasachariar*[1], which clinches the issue in question. The main contention of the respondent in the Madras Full Bench case was that even though the deceased father may have had absolute powers of disposal over the debt due to him, there is yet a coparcenary between himself and his undivided sons, which operates to alter the character of the properties into coparcenary properties as soon as he dies and in such a case a son gets it by right of survivorship. Reliance was placed upon the dicta in *Nana Tawker* v. *Ramchandra Tawker*[2] and *Fakirappa* v. *Yellappa*[3]. It was in that context that Kumaraswami Sastri, J., who wrote the leading judgment in *Vairavan Chettiar* v. *Srinivasachariar*[1], reiterated that the observation of the Privy Council in *Balwant Singh* v. *Rani Kishori*[4], was only a moral precept and not a rule of law capable of being enforced. The Full Bench referred to early rulings and accepted also in principle that the son acquired no legal rights over his father's self-acquisitions by reason of the text of Mitakshara. After accepting the above dictum the Full Bench observed thus:

> "It is difficult to see how there can be any coparcenary between the father and the sons as regards self-acquired property over

1. (1935) 69 M.L.J. 410: A.I.R. 1935 Mad. 775.
2. (1921) I.L.R. 44 Mad. 499: 40 M.L.J. 481 (F.B.).
3. I.L.R. (1959) Mad. 298: 72 L.W. 180: A.I.R. 1959 Mad. 253.
4. I.L.R. (1949) All. 160.
5. (1950) 1 M.L.J. 350: I.L.R. (1950) Mad. 1084 at 1089.

1. (1921) I.L.R. 44 Mad. 499 40 M.L.J. 481: (F.B.).
2. (1909) I.L.R. 32 Mad. 377.
3. (1898) I.L.R. 22 Bom. 101.
4. (1898) I.L.R. 20 All. 267.

which the sons have no legal claim or enforceable rights. Coparcenary and survivorship imply the existence of co-ownership and of rights of partition enforceable at law, and a mere moral injunction can hardly be the foundation of a legal right".

Again quoting *Sartaj Kuari* v. *Deoraj Kuari's case*[1], the Full Bench of our Court noted with approval that the property in the paternal or ancestral estate acquired by birth under the Mitakshara law is so connected with a right to partition that it does not exist where there is no right to it. Undoubtedly, a son and in the instant case Pennan-III, and his brothers Vellian and Anaikutti did not have a right to demand a partition from their father in regard to the self-acquired properties of Pennan-II. We are, therefore, of the opinion that as undivided sons had only a bare expectancy and an imperfect or inchoate right over the self-acquired properties of their undivided father, they could only be heirs under Hindu Law to such properties and they cannot claim heritage as if it was *apratibandha daya*. They had no right by birth nor is it contended before us that they had any such right. We have to therefore necessarily follow the dictum in *Vairavan Chettiar* v. *Srinivasachariar*[2], which is a direct decision which is binding on us.

23. We may also refer to a case of the Supreme Court reported in *Arunachala* v. *Muruganatha*[3], which reiterates the untrammelled power of the Mitakshara father to sell his self-acquired immovable property to a stranger without the concurrence of his sons and make even unequal distribution amongst his heirs. Effectively, the principle in *Vairavan Chettiar* v. *Srinivasachariar*[2], is assented to by the Supreme Court also by necessary implication. The net result of the discussion is that we are unable to agree with Mr. Narayanaswamy that the three sons who are themselves members of a Hindu joint family inherited the self-acquired property of Pennan-II and they took it as joint family property not merely between themselves and their sons but amongst themselves. On the other hand, we are of the view that Pennan-III and his brothers took Pennan-II's property as co-heirs under the law of inheritance and as tenants in common. There is high authority for the proposition that co-heirs take properties as tenants in common. Vide *Khadeersa Hajee Bappu* v. *Puthan Veettil Ayissa Ummath*[1] and *Yerukola* v. *Yerukola*[2].

24. The only properties as admitted in this case were the self-acquired properties of Pennan-II which were inherited by Pennan-III and his brothers as tenants in common and the other self-acquired properties of Pennan-III earned by him. Therefore, the only right of Pennan-III and his brothers would be to get their share only in Pennan-II's properties and the income therefrom. If it transpires that Pennan-III utilised any such income in excess of his legitimate share, he would have to account for it to his other brothers. In the instant case there is no clear proof whether Pennan-III utilised Pennan-II's properties or the income therefrom to the prejudice of his brothers. This has to be established in the final decree proceedings. If once it is proved that Pennan-III utilised Pennan-II's properties for acquiring properties in his own name then the only right which the brothers of Pennan-III and in this litigation the plaintiff and defendants 8 to 11 can claim would be to get their share of income so irregularly utilised by the heirs of Pennan-III, who are defendants 1 to 7 and they cannot claim any share in the acquisitions made by Pennan-III in his own name. This is because Pennan-III was only a tenant in common with respect to the properties of Pennan-II inherited by him as co-heir with his brothers. It is a matter of proof whether Pennan-III was in possession of more than one-third share of the proper-

1. (1888) I.L.R. 10 All. 272: 15 I.A. 51 (P.C.).
2. (1921) I.L.R. 44 Mad. 499 (F.B.): 40 M.L.J. 481: A.I.R. 1921 Mad. 168.
3. 1953 S.C.J. 707: 1954 S.C.R. 243: (1953) 2 M.L.J. 796: 66 L.W. 1072: A.I.R. 1953 P.C. 495.

1. (1911) I.L.R. 34 Mad. 511: 20 M.L.J. 288.
2. (1922) I L.R. 45 Mad. 648: 42 M.L.J. 507: 15 L.W. 595: A.I.R. 1922 Mad. 150.

ties left by Pennan-II and whether he used or utilised such excess share or other properties of Pennan-II or the income therefrom for acquiring properties of his own and in his own name which was to the prejudice of the plaintiff and defendants 8 to 11. This is a matter again to be investigated in the final decree proceedings.

25. The next incidental question which arises for consideration is whether there has been a severance in status and a division as between Pennan-III, Vellian and Anaikutti. Mr. Kesava Iyengar would fairly say that there is no clinching evidence as to the date and manner of the severance amongst the co-tenants, but he would refer to a series of transactions indulged in by the three brothers which would conclusively establish that they so conducted themselves as to give the impression to the outside world that they were independently enjoying the properties inherited by them from Pennan-II and were treating those properties as their own with the concurrence of the other two, that one was treating the properties in his possession as if they were his own and such dealings were other two. It is the common case of the partties before us that soon after the death of before us that soon after the death of Pennan-II, Pennan-III, Vellian and Anaikutti were enjoying defined portions of the properties inherited by them from Pennan-II and were either selling or mortgaging the same to the knowledge of all. Therefore, it is contended that no case of partition has arisen, as each of the sharers was already in possession of definable properties of Pennan-II and in that sense, no occasion has arisen for a preliminary decree for partition. We may at once state that no acceptable material has been placed before us to show that the three co-sharers are in enjoyment of specific items of property left by Pennan-II. In this sense, therefore, a preliminary decree for partition cannot be avoided, even if we accept the rather forcible argument on merits made by Mr. Kesava Iyengar. He has referred us to various documents under which the borrowings were made by Pennan-III and contended that all the properties purchased by him were from extensive borrowings from third parties. By way of elucidation, we shall refer to some of those incidents. Exhibits A-193, A-190, B-38, A-192, A-189, A-205, A-208 etc., show how Pennan-III ws dealing with those properties. In the case of such dealings some documents such as Exhibits P-192, A-189, A-191, etc., are all attested by Anaikutti. Some of the borrowings made by Pennan-III were discharged by Anaikutti himself, vide Exhibit A-121. In fact, the plaintiff himself under Exhibit A-210 received money from Pennan-III and cancelled the debt due therein. Similarly Vellian had his own independent transactions. Under Exhibit A-198, Vellian purchased properties. Under Exhibit A-200 Anaikutti sold some property to Vellian. Under Exhibits A-204, A-211, A-212, A-213, etc. Anaikutti sold certain properties to the plaintiff himself. We have evidence on record to show that Anaikutti had independently dealings by himself—vide Exhibit 219 etc. We have only illustratively referred to such transactions which are relied upon by Mr. Kesava Iyengar to show that there has been a severance in status between Pennan-III and his brothers. He would ask us to consider the cumulative effect of such dealings *inter se* as between the brothers and between the brothers and third parties. Reference is also made to the oral evidence of D.W. 2 to sustain a case of severance. No doubt, there is abundant volume of evidence in this case both documentary and oral to urge that the brothers were enjoying the properties of Pennan-II independently at least to some extent. But would that be sufficient to conclude that there was severance as between themselves and that there has been a partition of properties by metes and bounds. We are afraid that we are not in a position to opine that way. One significant factor in the course of this litigation was stressed before us to sustain the case of severance in status. Reference is made to an earlier litigation between the parties in O.S. No. 13 of 1946 already referred to. The 12th defendant in O.S. No. 161 of 1965 was the plaintiff in O.S. No. 13 of 1946. Pennan-II and his three sons and others were parties to that litigation. The allegation was that there was a severance in status. This suit was, however, ultimately withdrawn in 1949 under Exhibit B-272. What is urged before us is that by merely asking for a partition, a member effects severance in status as between

all the members in the joint family. Reliance is placed upon the decision in *Soundararajan* v. *Arunachalam*[1]. It is urged that the subsequent withdrawal cannot have any effect in the disruption in status of the family. In this sense, therefore, Mr. Kesava Iyengar contends that there has been such a severance in status. We should at once point out that the appellants were not able to point with any precision as to when exactly the severance in status, if at all there was one, took place. We are not inclined to accept the broad proposition that notwithstanding the withdrawal of the suit O.S. No. 13 of 1946, still it should be held that the family has divided itself in all respects because one of the members of the composite coparcenary in which Pennan-II was the head, filed a suit for partition and later withdrew it. The legal position relating to severance in status is by now well-established. We are not in this case referring in detail to the voluminous exhibits in which Pennan-III, Vellian and Anaikutti and their respective heirs conducted themselves in dealing with the properties in their possession. This is undoubtedly a case where Pennan-III, Vellian and Anaikutti domestically and internally arranged to enjoy the properties of Pennan-II separately. But it is not clear from the evidence on record nor has it been brought home to us as to what were the properties each of the sons of Pennan-II took after his death. The dealings would only show that there was a mixing-up of the properties when it suited them. One brother was borrowing and the other brother was discharging the debt. In some cases one of the brothers attested as a witness to the borrowings made by his brother. If at all there was a consistency, there was consistency in inconsistency. The voluminous records produced do not give us a clear impression that there was a division by metes and bounds as between the brothers. As already stated each was enriching himself by purchasing properties in their own name. Each was lending money and in turn borrowing moneys. Such an admixture of events and citation of facts do not evidence an unequivocal intention or an explicit declaration either as such or by conduct to sever.

1. (1916) I.L.R. 39 Mad. 159: 29 M.L.J. 793 at 816.

In order that conduct alone should be the sole criteria for a conclusion about severance, the Privy Council in *Girja Bai* v. *S. Dhundiraj*[1], said that the intention to separate may be evinced in different ways either by explicit declaration or by conduct and if it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit. There is no such clinching record or material for us to gain that impression. In *Suraj Narain* v. *Iqbal Narain*[2], once again the principle was reaffirmed that a definite and unambiguous indication by one of the members of a joint family (may be tenants-in-common) is necessary to separate himself and to enjoy his share in severalty. But to have that effect the intention must be unequivocal and clearly expressed. Separation from commensality does not as a necessary consequence effect a division. Such intention should not be purely subjective and exist in vacuum but should be made known objectively as Subba Rao, J., in *Raghavamma* v. *Chenchamma*[3], said:

> "The process of manifestation may vary with circumstances. What form that manifestation should take would depend upon the circumstances of each case. Thus, the knowledge of the members of the family of the manifested intention of one of them to separate from them is a necessary condition for bringing about that member's severance from the family".

Vide also the decision in *Puttrangamma* v. *Rangamma*[4]. Though Mr. Kesava Iyengar was at pains to refer to the various circumstances touching upon the conduct of the parties and said to be evidence of an unequivocal declaration on their part to sever and separate, yet we are unable to comprehend such a situation. The conduct of the parties no doubt fairly touch upon their behaviour to separately enjoy the properties which they inherited from Pennan-II. In what share

1. (1916) 43 I.L.R. 151: 31 M.L.J. 455: 4 L.W. 114: A.I.R. 1916 P.C. 104.
2. (1913) I.L.R. 35 All. 80: 40 I.A. 40: 4 M.L.J. 345 (P.C.).
3. (1964) 2 S.C.R. 933: A.I.R. 1964 S.C. 136.
4. (1968) 2 S.C.J. 668: (1968) 3 S.C.R. 119: A.I.R. 1968 S.C. 1018.

they were enjoying is yet to be found. If ultimately, in the final decree proceedings it is found that each of the sons of Pennan-II was enjoying fairly a third of the properties left by Pennan-II, then there may not be much of difficulty, but if they were unequally enjoying their shares, then it has to be found whether Pennan-III or Vellian or Anaikutti benefited themselves by causing a prejudice to the joint property. In any event however, the property purchased by Pennan-III or Vellian or Anaikutti in their names, shall be their own properties subject however to accounting by them, if it becomes necessary to the other brothers in case they were in enjoyment of properties in excess of their legitimate share. The properties in the name of Pennan-III shall be and ought to be accepted as his own properties. As, in our view, the three brothers took Pennan-II's properties as tenants-in-common and not as members of an undivided Hindu family. The principle laid down in *M. Cirimalappa* v. *R. Vellappagounda*[1], *Nallesappa* v. *Mallappa*[2], and a judgment of this Court in *Kumaraswamy* v. *Subba Gounder*[3], would not apply. The case of the plaintiff and defendants 8 to 11 is that Pennan-III was in sole management of the entirety of the properties. Even if he was, it cannot be said that he was in possession of those properties or any share in excess of his legitimate share as the "manager of an undivided Hindu family". It may be that a co-owner was irregularly enjoying the property of another co-owner. As already stated by us, he would only be accountable to the income from those properties enjoyed by him in excess of his legitimate share. Even if in the course of such enjoyment he has purchased properties in his own name, they will be his self-acquisitions, but the only responsibility of his would be to shed the excess share of his possession and account for its income to his other two brothers. Mr. Narayanaswamy's contention is that applying the principles in the above cases cited, the acquisitions made by Pennan-III should be equated to the accretions made by the manager of a Hindu undivided family. This principle will not squarely apply to a case of co-sharers or co-owners. In the case of the three brothers in question, they had indisputably a right over a third of the properties. By accident or by sufference or by consent, if Pennan-III or any one of the other brothers were in possession of and in enjoyment of a share which is not equal to an one-third share of Pennan-II's properties, they would only be surcharged for the corpus or income which they enjoyed until a physical partition takes place. But their exertions which are independent as co-owners without reference to the others cannot be said to be for the benefit of the other two owners. In this sense, therefore, the question as to nucleus, blending, throwing into the common-stock etc., which would arise only in cases of acquisitions made by coparceners from and out of the income of coparcenary properties when they remained joint do not arise and are not relevant for purposes of the present case. This is because, the case in question relates to acquisition from and out of inherited properties held as tenants-in-common and not from coparcenary property held as joint tenants. The adjustment of equities, therefore, should be made as indicated above.

26. The only surviving question is whether the suit is barred by limitation?

27. Here again we are unable to agree with Mr. Kesava Iyengar that the suit is barred by limitation. We have in the earlier portion of our judgment expressed the view that in spite of voluminous evidence oral and documentary, there was no proof or clinching material *aliunde* to show that there was a severance as between the co-owners in a realistic sense and that there was an equitable and equable division of their independent third share amongst themselves and there was not even evidence to show that at any particular point of time any such declaration was made and expressly communicated by one to the other so that an ouster of the same in relation to the properties held by the other two could reasonably be inferred. We have also referred to the impact which the earlier 1946 suit had in the course of this litigation. O.S. No. 13 of 1946 was filed in which Pennan-III and almost all the parties to the present action were parties. Pennan-III

1. A.I.R. 1959 S.C. 906.
2. (1962) 2 M.L.J. (S.C.) 154: (1962) 2 S.C.J. 589: (1961) 3 S.C.R. 779: (1962) 2 An.W.R. S.C. 154: A.I.R. 1961 S.C. 1268.
3. (1977) 90 L.W. 583: A.I.R. 1977 Mad. 353.

besides making assertions of severance and his independent title to all his properties did not pursue his stand to the end and there was no real adjudication on the rights of parties excepting pleadings. No doubt the trial Court rendered its judgment in O.S. No. 13 of 1946. But the main suit was withdrawn at the appellate stage. It is therefore, doubtful whether the infructuous pleadings by themselves and the evidence let in in that case to show that each of the brothers were dealing with the properties of Pennan-II in their possession, as if it was their own cannot succinctly and pointedly lead to the conclusion that there was an assertion of hostile title by Pennan-III, Vellian and Anaikutti, by one as against the other. It is only in cases of such proven ouster and established assertions of sole and exclusive title and denial of title in others, the question of adverse possession can arise. If adverse possession is established and proved to the satisfaction of Courts, then only Article 65 or Article 113 of the Indian Limitation Act would apply. The case before us could at best be illustrative of the position that each co-owner was enjoying some portion of the joint properties whilst others were enjoying the other portions. At best it was the result of a subjective domestic adjustment of rights. There is no showing that such enjoyment was by virtue of an agreement or a proved understanding. Even in a case where a member of a Hindu family, who is divided in status from others is in enjoyment of some portions of the family properties while others enjoy other portions he is not in law excluded or ousted from other portions so as to disentitle him to his share of those portions however long their enjoyment by others. (Vide *Kumarappa Chettiar* v. *Swaminatha Chettiar*[1].) We are unable to find, nor is it seriously urged before us that Pennan-III or Vellian or Anaikutti were in exclusive possession of a defined or identifiable portion of Pennan-II's properties and that such possession was adverse to the other two brothers. Borrowings made to the knowledge of others or dealings *inter se* between the brothers or evidence of mutation proceedings or proceedings for mutation of names have to be understood as an understanding conduct as between the brothers without any legal implications thereto and such domestic adjustment or rights in a family forum cannot be the sole criteria for deciding legal rights and particularly on a question whether the suit laid by the plaintiff and consented to by some of the defendants is barred by the statute of limitations. In fact, in *Nirman Singh* v. *Rudrapratap Narain Singh*[1], the Privy Council characterised proceedings for mutation of names as not a judicial proceeding in which the title to and the proprietory rights in immovable property are determined, but are more in the nature of physical enquiries instituted in the interest of the State for ascertaining which of several rival claimants to the occupation of movable property may be placed in possession of it with greater probability that the Revenue will be duly paid. Even so, the illustrative examples referred to by us earlier out of the many transactions quoted before us by Mr. Kesava Iyengar which in turn refers to the dealings which each of the brothers had either independently or in conjunction with one another cannot be misunderstood as conduct which reflects upon the title of each of the brothers over the respective properties dealt with by them. At best they have persuasive value but by themselves cannot be conclusive of title and evidence of ouster or adverse possession. *Govindarao* v. *Rajabai*[2] cited by Mr. Kesava Iyengar to support his plea that the suit is barred by limitation presents a different set of facts. There it was satisfied beyond doubt that the possession of one of the owners was adverse for more than the statutory period with reference to the other co-owners. In fact, there was evidence in that case that one co-owner did not have possession or participation of profits in the properties for more than the statutory period and that in spite of knowledge that such properties in which he had an interest were adversely being enjoyed by others, the affected party kept quiet. It was in those circumstances, the Privy Council in *Govindarao* v. *Rajabai*[2], held that the possession of one party was adverse to the others. But in our view there is no such clinching

1. (1919) I.L.R. 42 Mad. 431: 36 M.L.J. 612.

1. (1926) 51 M.L.J. 836 (P.C.): 25 L.W. 1: 53 I.A. 220: A.I.R. 1926 P.C. 100.
2. (1931) 60 M.L.J. 386: 33 L.W. 439; 58 I.A. 106: A.I.R. 1931 P.C. 48.

evidence in this case. The case reported in *Parbati* v. *Naunihal Singh*[1], relied upon by Mr. Kesava Iyengar was also a case in which the members of a Hindu family agreed that the joint property should be held and enjoyed by the various members of the family in certain defined shares which they specified in writing in public record. It was in those circumstances, the Court held that the transactions and conduct of the members of the family with respect to the management of the property had been on the basis that it was held in separate shares from that time. We have expressed the view that the cumulative effect of all the transactions had when Pennan-III was alive and which had a relevant impact upon the conduct of Vellian and Anaikutti, as also the conduct of the three co-owners could not have been on the basis that there was any agreement on the basis of which they were in possession of defined shares in the properties of Pennan-II. The position of each of the brothers was as a result of a mutual unwritten understanding and this does not effectively give out to the outside world that such possession of their properties sprang from a mutual final adjustment of rights. There is no proof excepting the suit of 1946 which was later on withdrawn that there was ever a demand and a refusal to account by one to the other. The cause of action prior to the institution of the present suit did not come into being earlier. So the period of limitation cannot run until the cause of action arose. In our view, the cause of action arose for the first time on the institution of the present suit. In the ultimate analysis we are unable to find that anyone of the brothers was ousted or excluded from the joint properties so as to allow the law of limitation to operate. We agree with the Court below that the suit is within time.

28. The result of our discussion as above could be summarised thus:

"The plaintiff is granted a declaration that he is entitled to a one-third share in the properties left by Pennan-II.

2. If it is found in the course of the final decree proceedings that either Pennan-III and his branch or Vellian and his branch were in possession of properties in excess of one-third share in Pennan-II's properties, they would have to shed the same and account for mesne profits in respect of such excess of properties in their possession, to the plaintiff.

3. In so far as the properties standing in the name of Pennan-III or Vellion or Anaikutti they shall be their respective self-acquired properties and shall be considered as such.

4. There is no positive proof that there has been a severance in status or an effective division as between the co-owners, namely, Pennan-III, Vellian and Anaikutti and the evidence on record either independently scrutinised or cumulatively considered does not give such an impression.

5. In so far as the will Exhibit A-168 executed by Pennan-III is concerned, it would be valid and enforceable as regards his own properties acquired by him and also in so far as they relate to the properties acquired by Pennan-III after the death of Pennan-II, as in our view would be his self-acquired properties and in consequence he would have a valid disposing power over them.

6. We find, as already stated, that the suits are within time."

29. A preliminary decree for partition is, therefore, passed in favour of the plaintiff declaring his right over the one-third share in the properties of Pennan-II and in so far as the accounting portion *inter se* as between the parties is concerned, it is relegated to the final decree proceedings.

30. We shall now take up O.S. No. 124 of 1964 against which A.S. No. 141 of 1972 arises. This is a suit in which the sons of Pennan-III through his second wife are fighting the sons of Pennan-III through his first wife. The plaintiffs in this suit are defendants 4, 5, and 6 in O.S. No. 161 of 1965. The defendants in this suit are defendants 1, 2 and 3 in that suit. The plaintiffs alleged that the properties described in Schedules A to E are the self-acquired properties of Pennan-III and they were acquired by him as his absolute property by his own exertions without reference to the joint family property or

1. (1908) I.L.R. 31 All. 412.

income. According to them Pennan-III executed a will Exhibit A-168 bequeathing the suit properties in favour of the plaintiffs and the defendants in equal shares and though each of them was enjoying the properties separately by mutual consent and agreement, yet the first defendant in this suit has unauthorisedly interrupted the possession of the plaintiffs and was enjoying the income of all the properties to the prejudice of the plaintiffs and it has, therefore, become necessary for them to sue for partition and separate possession of their one-half share in the suit property. Later on they included the properties set out in Schedule A-1, B-1, C-1, D-1, and E-1. In so far as these properties are concerned, the plaintiffs' case is that they are joint family properties in which the plaintiffs and defendants are both entitled to a one-third share and the plaintiffs alone being entitled to one-sixth share. The defendants denied that the suit properties as originally contained in the plaint are the self-acquired properties of their father. They would set up a case of blending of the properties acquired by Pennan-III from Pennan-II and that all the suit properties included in Schedules A to E and A-1 to E-1 are joint family properties and that a division if at all has to be made in that light. As in the view of the defendants in this case the properties are all joint family properties, the will as such is unenforceable. In so far as the rest of the pleadings are concerned the defendants' case is that there was always an undivided joint Hindu family and the rights of parties had to be worked out in that light. Thereafter, the pleadings in O.S. No. 161 of 1965 which have already been set out, are repeated by the defendants.

31. The learned trial Judge in view of his findings earlier held that the will Exhibit A-168 is unenforceable in all respects. He also held that the parties agreed that there was no E Schedule property. He rendered a judgment in accordance with his findings as above.

32. But in view of a partial modification of the judgment of the trial Court in the light of our discussions in A.S. No. 142 of 1972, we modify the judgment of the Court below in O.S. No. 124 of 1964 as under.

33. As there was no argument before us about the validity of the will Exhibit A-168 it is upheld. We hold that Exhibit A-168 will be operative not only as regards the properties which Pennan-III would acquire as per our decision in O.S. No. 161 of 1965 which is a one-third share in Pennan-III's properties, but also with reference to the properties which he purchased and acquired in his own name after the death of Pennan-II. We also pass a preliminary decree for partition as prayed for by the plaintiffs in respect of their one-half share in such properties as per the directions in the will and relegate the parties in respect of the accounting of the mesne profits therefrom in the final decree proceedings.

34. In the result, therefore A.S. No. 141 of 1972 and A.S. No. 142 of 1972 are allowed in part and a preliminary decree shall issue in each of the cases as per our judgment above. All the parties both in the Court below and before us shall bear their own costs and such costs shall come out of the estate.

35. The cross-objections filed by the legal representatives of defendants 17 and 18 stand dismissed and there will be no order as to costs.

36. These appeals and the memorandum of cross-objections having been set down this day for being mentioned, the Court made the following order:

The Order of the Court was made by the Hon'ble the Chief Justice:

38. Learned counsel appearing before us agree that as no orders have been passed apparently by inadvertance in C.M.P. No. 9232 of 1977, which was an application to bring on record the legal representatives of the deceased 13th respondent, it has to be ordered. Accordingly, the said C.M.P. No. 9232 of 1977 is ordered as prayed for.

39. As regards the cross-objections in A. S. No. 141 of 1972, counsel agree that in view of the judgment already rendered by us it has to be dismissed, and the cross-objections filed in A.S. No. 142 of 1972 has to be allowed as this result follows from the judgment.

40. Ordered accordingly.

S.J. ——— *Appeals partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Arumugha Gounder .. *Appellant**

v.

Kannammal and another .. *Respondents.*

Tamil Nadu Agriculturists Relief Act (IV of 1938) (as amended by Act VIII of 1973), section 19 (1)—Decree on promissory note—Execution by decree-holder against immovable property of judgment-debtor—Property brought to sale—Purchase by 'S' in Court auction—Payments of money meanwhile by judgment-debtor from time to time towards decree—Sale not confirmed—Application by judgment-debtor at that stage for scaling down the debt and for amendment of the decree—Another application by him for setting aside sale—Decree whether gets merged in the Court-auction sale—Maintainability of the application.

A decree passed by a Court is either executed or not executed. In either case, the decree does not simply vanish into thin air. The theory of merger is usually employed to denote what happens when an appellate Court either confirms or modifies or varies the decree of a lower Court. In those circumstances, it would be a proper use of the expression to say that the trial Court's decree gets merged with the appellate Court's decree. The conception of merger is appropriate where two things which get merged are of the same kind. It would be quite inappropriate to cover a case, where, pursuant to a decree, the judgment-debtor's property is brought to sale. Even where full satisfaction is entered and the property delivered over to the auction-purchaser, the decree cannot, in the proper sense of the expression, be said to merge with the sale and it cannot even be said to be 'extinguished' by the sale in execution. [*Para.* 8.]

Section 19 of Act IV of 1938 confers a right on the judgment-debtor, who is an agriculturist, to apply to a Court for scaling down a debt and for amending the decree in accordance therewith. There is nothing in this provision to suggest that an application thereunder would not lie in a case where pursuant to the decree the property of the judgment-debtor has been brought to sale and the auction-purchaser purchases it in Court-auction. The presence of the auction-purchase with such rights as he may claim by virtue of his purchase does not in any way disentitle the judgment-debtor from invoking the provisions of section 19 of the Act. [*Para.* 9.]

Held: Where after a sale in execution of a decree on a promissory note and before its confirmation, the judgment debtor who had in the meanwhile been making payments from time to time towards the decree applied under section 19 (1) of the Madras Agriculturists Relief Act for scaling down of the debts and for amendment of the decree, the application would be maintainable and nonetheless so for the fact that at that moment the property of the judgment-debtor had already been brought to sale in execution of the decree.

Cases referred to:

Bangaru Chettiar v. *Son Basha Sahib*, (1976) 2 M.L.J. 171: 89 L.W. 510: A.I.R. 1977 Mad. 1; *Muthuswamy Pillai* v. *Jaganadha Reddi*, (1929) M.W.N. 729: A.I.R. 1929 Mad. 830; *Vannavilli Lakshminarasimha Rao* v. *Ganapati Muneyya*, (1940) 52 L.W. 244: (1940) 2 M.L.J. 234: A.I.R. 1940 Mad. 825; *Munuswamy Pillai* v. *Madhi Hussain Khan Sahib*, (1910) M.W.N. 180: I.L.R. 34 Mad. 12: 20 M.L.J. 254.

Appeals against the Orders of the Court of the Subordinate Judge, Tiruvannamalai, dated 23rd September, 1974 and made in C.M.A. No. 30 of 1973 and C.M.A. No. 7 of 1974 respectively (R.E.A. Nil/73 in R.E.P.No. 903 of 1972 in O.S. No. 977 of 1967 and I.A. No. 1902 of 1973 in O.S. No. 977 of 1977 on the file of the Court of the District Munsif, Tiruvannamalai respectively).

M. Srinivasan, for Appellant.

B. Motilal Jain, for Respondent.

The Court made the following

ORDER.—Kannammal obtained a decree against Arumugha Gounder in a suit on a promissory note in O.S. No. 977 of 1967 on the file of the District Munsif of Tiruvannamalai. The decree was passed on 21st February, 1968 for Rs. 2,158-00 with further interest and costs. The decree-holder levied execution by proceeding against the immovable property of the judgment-debtor. The property was brought to sale on 13th June, 1973. One Shanmugham purchased it in the Court-auction for Rs. 1,751. Meanwhile, the judgment debtor had paid sums of money from time to time towards the decree, amount-

*A.A.A. O. Nos. 184 and 185 of 1974. 26th July, 1978

ing in all to Rs. 2,100. The sale in favour of the auction-purchaser was yet to be confirmed, and at that stage, the judgment-debtor filed two applications before the District Munsif's Court, Tiruvannamalai. I.A. No. 1902 of 1973 was an application filed under section 19 (1) of the Tamil Nadu Agriculturists Relief Act IV of 1938) as amended by Act VIII of 1973 for scaling down the debt and for amendment of the decree. He also filed another application under section 23-C of the same Act, as amended by Act VIII of 1973 for setting aside the sale in favour of the auction-purchaser. This application under section 23-C was not numbered, but was dismissed by the learned District Munsif The reason for dismissal will be clear by what the learned District Munsif did with reference to I.A. No. 1902 of 1973 filed by the judgment-debtor for amendment of the decree. The learned District Munsif held that the application for amendment of the decree did not lie because at that time there was no decree to be amended, the decree having been executed and having culminated in the sale of the judgment-debtor's property. According to the learned District Munsif, the decree merged in the Court-auction sale. In this view, he dismissed I.A. No. 1902 of 1973. As for the other application filed under section 23-C, the learned District Munsif held that the application did not lie under the section.

2. Against both the orders, the judgment-debtor appealed to the learned Subordinate Judge, Tiruvannamalai, who, however, confirmed the decision of the Court below. The judgment-debtor now carries both the matters in further appeals before this Court.

3. C.M.S.A. No. 184 of 1974 arises out of the dismissal of the judgment-debtor's application under section 23-C Mr. N. Srinivasan, learned counsel for the judgment-debtor, was unable to any in what manner the dismissal of the application was not in accordance with the law. The sale, admittedly, was hold on 13th June, 1973, subsequent to the publication of the amendment Act VIII of 1973 on 24th January, 1973. Hence, on the basis of the ruling in *Bangaru Chettiar* v *Son Basha Sahib and another*[1], the application was clearly not maintainable under section 23-C of the Act. C.M.S. A. No. 184 of 1974 must, therefore, be dismissed.

4. As for the other appeal, C.M.S.A. No. 185 of 1974 Mr. Srinivasan submits that both the Courts below were in error in holding that the judgment-debtor was not entitled under the law to ask for sealing down of the debt and for amendment of the decree under section 19 of Act IV of 1938 as amended by Act VIII of 1973 His contention was that the Courts below were wrong in their notion that an execution sale has the effect in law of extinguishing the decree. According to learned counsel, a decree would be kicking and alive so long as full satisfaction has not been entered. He relied on an earlier decision of this Court reported in *Muthuswamy Pillai* v. *Jaganadha Reddi*[1], for the general proposition that a decree can be amended so long as there is something in the decree to operate upon. In the particular case cited by the learned counsel not only was there an execution of the decree, but even full satisfaction had been entered after levying prosecution. Even in such a case, it was held that it was no bar to an amendment of the decree.

5. Learned counsel also referred to a more recent decision of this Court reported in *Vannavilli Lakshminarasimha Rao* v. *Ganapati Muneyya*[2], which had expressed the view that an application for stay under section 20 of Act IV of 1938 would lie even in a case where full satisfaction had been entered after sale of the property of the judgment-debtor, if the property had not been delivered to the auction-purchaser. Learned counsel also referred to section 19 of the Act to say that there was nothing in the section or elsewhere in the Act which bars the application for amendment of the decree on the one and only ground that the property of the judgment-debtor had been brought to sale in execution of the decree.

6. Learned counsel for the decree-holder and for the auction-purchaser, however, submitted that the judgment-debtor had by her own laches and delay allowed the property to be brought to sale and in those circumstances when the decree had not only been executed but had culminated in a sale of the property of the judgment-debtor, there was no question thereafter of seeking to amend the decree in execution of which the property itself had been brought to sale.

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1. (1976) 2 M.L.J. 171: 89 L.W. 510: A.I.R. 1977 Mad. 1.

1. (1929) M.W.N. 729: A.I.R. 1929 Mad. 830.

2. (1940) 52 L.W. 244: (1940) 2 M.L.J. 234: A.I.R. 1940 Mad. 825.

7. Having considered the respective submissions of the learned counsel on either side, I am inclined to accept the contention put forward on behalf of the judgment-debtor by Mr. Srinivasan as well-founded.

8. The learned Subordinate Judge in his order had expressed the view that when the property of the judgment-debtor is brought to sale in execution of the decree, what happens is that the decree gets merged with the sale. I cannot understand the conception of a merger being employed to describe this process of execution. In my view, a decree passed by a Court is either executed or not executed. In either case, the decree does not simply vanish into thin air. The theory of merger is usually employed to denote what happens when an appellate Court either confirms or modifies or varies the decree of a lower Court. In these circumstances' it would be a proper use of the expression to say that the trial Court's decree gets merged with the appellate Court's decree. The conception of merger is appropriate where two things which get merged are of the same kind. It would be quite in appropriate to cover a case where, pursuant to a decree, the judgment-debtor's property is brought to sale. I go to the extent of saying that even where full satisfaction is entered and the property delivered over to the auction-purchaser, the decree cannot, in the proper sense of the expression, be said to merge with the sale and it cannot even be said to be 'extinguished' by the sale in execution. I must therefore, reject the reasoning of the Courts below.

9. Section 19 of Act IV of 1938 confers a right on the judgment-debtor, who is an agriculturist, to apply to a Court for scaling down a debt and for amending the decree in accordance therewith. There is nothing in this provision to suggest that an application thereunder would not lie in a case where pursuant to the decree the property of the judgment-debtor has been brought to sale and the auction-purchaser purchases it in the Court-auction. I cannot accept the thesis that the presence of the auction-purchaser with such rights as he may claim by virtue of his purchase in any way disentitles the judgment-debtor from invoking the provisions of section 19 of the Act.

10. Even on general principles, the position would seem to be the same. Although the two decisions cited by Mr. Srinivasan are not directly ceases which arose either under section 19 or under any of the other provisions of Act IV of 1938, the principles on which they are based are apposite for deciding the present case. In the earlier case in *Munuswamy Pillai* v. *Jagannadha Reddi*[1] Ananthakrishna Ayyar, J., observed as under:—

> "The moment a decree for money is passed, it is open to the judgment-debtor to pay the money into Court, say, the day after the decree is passed. That does not mean that by so doing it disentitles the decree-holder from applying to the Court for amending the decree if the decree should be not in accordance with the judgment.
>
> ...."

The learned Judge referred to an earlier decision of this Court reported in *Munisamy Pillai* v. *Madhi Hussain Khan Sahib*[2] in which a decree-holder applied for amendment of the decree after the decree was executed and full satisfaction entered. The Court held that it was open to the decree-holder to get the decree amended but he could do so only after vacating the order entering full satisfaction. In the case before Ananthakrishna Ayyar, J, although the decree sought to be amended was executed, full satisfaction had not been entered and the learned Judge allowed the application. In the end, the learned Judge granted the application for amendment. The implication of this decision is that an execution sale cannot in any manner destroy or extinguish the decree and an application for amendment would certainly lie with reference to that decree.

11. The other case cited by the learned counsel, namely, *Lakshminarasimha Rao* v. *Ganapati Muneyya*[3], arose under this very Act IV of 1938. In that case, a simple money decree was executed by sale of the property of the judgment-debtor. The sale was confirmed in favour of the auction-purchaser, and what remained was for the auction-purchaser to obtain delivery of possession of the property. At that stage, the judgment-debtor filed an application under section 20 of the Act and the question was, whether the judgment-debtor was entitled to an order of stay in the events that happened. It was suggested before Horwill, J., who heard the case that there was no execution pending at the time of the stay application and, therefore, no stay could

1. (1929) M.W.N. 729: A.I.R. 1929 Mad. 830.

2. (1910) M.W.N. 180 : I.L.R. 34 Mad. 12: 20 M.L.J. 254.

3. (1940) 2 M.L.J. 234: (1940) 52 L.W. 244.

be granted. The learned Judge held that the fact that the sale in execution of the decree had taken place and further that the sale had been confirmed in favour of the auction-purchaser does not mean that the execution proceedings are over. The learned Judge observed that delivery of property is the most important stage of execution and merely because full satisfaction has been entered, up, it does not mean that execution is at an end. It is but a step in the reasoning to say that if execution is not at an end merely for the reason that a sale in execution had taken place, the decree itself must be regarded as still existing and can by no means be regarded as non extent.

12. On the basis of the principles which I am able to extract from the aforesaid two decisions and on my reading of the scope and effect of section 19 of Act IV of 1938, I am satisfied that the application filed by the judgment debtor in this case under section 19(1) of the Act for scaling down of the debt and for amendment of the decree was maintainable and nonetheless so for the fact that at that moment the property of the judgment-debtor had already been brought to sale in execution of the decree.

13. For the reasons aforesaid, I allow C.M.S. A. No.186 of 1974 and set aside the orders of the learned Subordinate Judge and the learned District Munsif. I.A.No.1902 of 1973 will accordingly be restored to the file of the learned District Munsif and he is directed to go into the merits of the application in accordance with law. There will be no order as to costs in both these appeals.

R.S. — *Appeal allowed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*Ramaprasada Rao, CJ., A. Varadarajan and V. Sethuraman, JJ.*

The Chief Controlling Revenue Authority, Pondicherry .. *Petitioner**

v.

M/s. Mayavaram Financial Corporation Limited Mayavaram, represented by its Managing Director .. *Respondent.*

(A) *Indian Stamp Act (II of 1899), sections* 2 (17), 33 *and Articles* 40 *and* 57 *of Schedule I—"Undertaking affidavit" given by a prize winner at the auction of the Chit—Proper stamp duty payable.*

(B) *Indian Stamp Act (II of 1899) section* 2 (17)—*Transfer of Property Act (IV of 1882), section* 58 (a).

One *T*, a chit prize winner, executed a document styled "undertaking affidavit" in favour of the respondent a chit fund company, as security document under which *inter alia* he offered as security as certain house in Pondicherry by way of first charge for the collection of the amount due to the chit fund company; contemporaneously he agreed to deposit the title deeds of the said property. The "undertaking affidavit" was executed on stamp papers of the value of Rs. 22 50. When the document was presented for registration, it was impounded under section 33 of the Stamp Act. Taking the view that the document reflected a mortgage within the meaning of section 2 (17) of that Act making it chargeable for stamp duty under Article 40, Schedule I, the District Registrar called on *T* to pay the deficiency of Rs 506,25 and also a penalty of Rs. 5. *T* applied to the High Court for a *mandamus* to direct the Chief Controlling Revenue Authority, Pondicherry, to make a reference. under section 57 of the Stamp Act. The present Reference was made accordingly. *T* contended that, if at all the "undertaking affidavit" was chargeable, it should be only under Article 57 (*b*) of Schedule I of the Stamp Act.

Held: As no form is required to operate as a mortgage, the intention of the parties has to be gathered from a fair and reasonable reading

*Ref. Case No. 1 of 1978. *24th April,* 1979.

of the entire instrument, which ought to be the basis to find out whether a given instrument is a mortgage or not, and the literal sense of the expression used does not generally serve as a guide for the interpretation of deeds; but it is the real meaning of the transaction which has to be gathered as a whole. That is the proper test to find out the character of the document. [*Para.* 6.]

The only essential difference between the Transfer of Property Act and Indian Stamp Act appears to be that whilst under the Transfer of Property Act mortgages relate to immovable property alone, the Stamp Act applies that term to the transfer of both movable and immovable properties. It should also be borne in mind that under section 100 of the Transfer of Property Act, a charge is created over immovable property, notwithstanding the fact that the transaction does not amount to a mortgage and the Act makes all the provisions which apply to a simple mortgage as being applicable to such created charges. To make an instrument a mortgage deed there should be a transfer of a right over specified property, not only for the purpose of securing money advanced or to be advanced by way of a loan, but also when the transfer is effected for the performance of an engagement When once the property is described distinctly and a charge is created over such defined property not only for payment of a debt, which is admittedly due by the transferor, but also for the performance of an engagement as undertaken by him under the instrument, it would be undoubtedly a mortgage deed. If the given instrument is a mortgage deed, then stamp duty as contemplated in Article 40 of the Schedule I of the Indian Stamp Act would be attracted. Under Article 40 even a security bond hypothecating a property executed in favour of the Court under Order 41, rules 5 and 6 of the Code of Civil Procedure would attract stamp duty under Article 40, provided the security bond involves a mortgage over immovable property. [*Para.* 6.]

The quientessence of the subject seems to be that once the intention of the executant of a deed is clear that he was mortgaging immovable property or offering it as security or as a charge for the due performance of an engagement undertaken by him under it, it would undoubtedly be a mortgage deed, which has to be stamped under Article 40 of the Indian Stamp Act. [*Para.* 7.]

Though Article 57 deals with security bond or mortgage deed, yet it is not all bonds that are commonly called security bonds that fall under this Article. But it should satisfy the purpose enumerated in Article 57 [*Para.* 8.]

It should be by way of security for the due execution of an office, or to account for money or other property received by virtue thereof, or executed by a surety to secure the due performance of a contract. In so far as the "undertaking affidavit" is concerned, it would not come under the various heads specifically enumerated in Article 57. The totality of the impression gained on a reading of the instrument and after ascertaining the intention of the parties, makes it clear that the "undertaking affidavit" has to be charged as a mortgage deed, which has to suffer stamp duty as prescribed under Article 40 of Schedule I of the Indian Stamp Act. [*Paras.* 8 *and* 10.]

Article 40 and not Article 57 of Schedule I to the Stamp Act is the appropriate article applicable to the instant case. [*Para* 12.]

Cases referred to:—

Abubacker Labbai v. *Chinnathambi Rowther*, (1938) 1 M.L.J. 159: I.L.R. (1938) Mad. 460: 47 L.W. 154: A.I.R. 1938 Mad. 262; *Natesa Aiyar* v. *Sahasranama Iyer*, (1927) 53 M.L.J. 550: A.I.R. 1927 Mad. 773.

Case referred by the Controlling Revenue Authority, Pondicherry in his Letter No. 15004/c/77, dated 28th February, 1978, to the High Court under section 57 of the Indian Stamp Act, 1899 for deciding the question as to "whether the "undertaking affidavit" is chargeable under Article 40 or under Article 57 (*b*) of Schedule I to the Stamp Act."

C. Krishnan, the Government Pleader for Pondicherry, for Petitioner.

R.N. Kothandaraman, for Respondent.

The Order of the Court was made by

Ramaprasada Rao, CJ.:—This reference comes before us on a *rule nisi* issued by this Court in the nature of a writ of *mandamus* to the Chief Controlling Revenue Authority, Pondicherry to make a reference under section 57 of the Indian Stamp Act, 1899 so as to assess the correct stamp duty payable on a document styled as an 'undertaking affidavit' executed by one Thiru Savariappam Remi in favour of th respondent.

2. The relevant facts leading to the reference, as stated in the statement of the case filed by the Chief Controlling Revenue Authority, Pondicherry, which are not disputed before us, are as follows:—

The respondent company is running a chit fund, having been licensed under the Tamil Nadu Chit Funds Act. and its registered office is at Mayuram. One Thiru Savariappam Remi became a successful bidder in a chit for Rs 50,000 at the 18th drawing held on 13th November, 1975 The highest bidder was apparently a resident of Pondicherry State. The auction chit having been knocked down at the prize amount of Rs. 23,245 the respondent chit fund company took certain documents from Thiru Savariappam Remi and *inter alia* he executed what is known as an 'undertaking affidavit' which was one of the security documents. Under this undertaking affidavit he offered as security a terraced and tiled house situate at door No. 11, Thulava Veerasami Naicker Street, Muthialpet in Pondicherry. This undertaking affidavit has been fully set out therein. On receipt of the prize amount Thiru Savariappam Remi executed a promissory note along with his wife and one Bagianathan for payment of the instalments of the Chit fund company. By way of further assurance for regular payment of future subscriptions of the chit and in addition to the security by way of a promissory note executed as above. Thiru Savariappam Remi agreed and undertook to create a first charge over the property detailed in the schedule to the affidavit. The affidavit further provides that the Foreman of the chit fund company shall be entitled to colleot the entire amount of future • instalments of the chit due from the date of default, with all charges and expenses incurred in connection therewith, having a first charge over the property mentioned in the schedule given in the affidavit. The affidavit also proclaims that over the property mentioned in the schedule to the affidavit, the Foreman shall have a first charge for the collection of the amount due to the chit fund company. Contemporaneously Thiru Savariappam Remi has agreed to deposit the title deeds of the said property. The undertaking affidavit was engrossed on stamp papers for the value of Rs. 22.50. When that document was presented for registration to the Joint Sub-Registrar of Pondicherry on 20th November, 1975, it was impounded by him under section 33 of the Indian Stamp Act and he submitted the same to the District Registrar for proper assessment of stamp duty. The District Registrar was of the view that the undertaking affidavit reflects a mortgage over immovable property and the intrinsic recitals in the affidavit make it chargeable for stamp duty under Article 40 of Schedule I of the Indian Stamp Act. Thiru Savariappam Remi was called upon to pay the deficit duty of Rs. 506 25 as also a penalty of Rs. 5, which he paid under protest. Thereafter, he came to this Court for a writ of *mandamus* to direct the Chief Controlling Revenue Authority, Pondicherry, who is the petitioner in this reference, to make a reference under section 57 of the Indian Stamp Act, 1899 as Thiru Savariappam Remi was of the view that the undertaking affidavit was properly stamped. The petitioner, after considering the recitals in the document, which have been succinctly referred to above, was of the view that the recitals therein were enough to treat the undertaking affidavit as creating a mortgage over immovable property within the meaning of section 2 (17) of the Indian Stamp Act. The alternative contention of Thiru Savariappam Remi that at best the undertaking affidavit would be chargeable as the security bond under Article 57 (*b*) of Schedule I to the Stamp Act, was negatived by the petitioner. Pursuant to the directions of this Court, the petitioner referred the subject to us to decide the question as to whether the undertaking affidavit is chargeable under Article 40 or under Article 57 (*b*) of Schedule I to the Stamp Act.

3. **The contention of the learned counsel for the petitioner is that on a fair reading of the affidavit, it squarely satisfies the ingredients of the definition of a mortgage given under section 2 (17) of the Indian Stamp Act itself and as a charge has been created over the immovable property for the prefotmance of an engagement undertaken by Thiru Savariappam Remi with the respondent company, itself was chargeable as a mortgage deed.**

4. **Countering this connection, learned counse for the respondent would say that the affidavit merely disclosed an undertaking and if at all it was chargeable it should be only under Article 57 (*b*) of Schedule I of the Indian Stamp Act.**

5. **We are unble to agree with the learned counsel for the respondent. In order to appreciate the rival contentions, it would be convenient to refer to the definition of 'mortgage' in section 58 of the Transfer of Property Act, as well as the definition of the 'mortgage deed' in the Indian Stamp Act, 1899. Section 85 (*a*) of the Transfer of Property Act, reads:-**

> "A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest on which payment is secured for the time being are called the mortgage-money and the instrument (if any) by which the transfer is effected is called a mortgage-deed."

6 The last portion of the definition gives a clue to interpret what a mortgage, amongst other things could be. Undoubtedly if there is a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan it would be a mortgage. Equally so, if there is a transfer, of an interest in such immovable property for the performance of an engagement which may give rise to a pecuniary liability, which involves a legal obligation, even then it would be mortgage within the meaning of section 58 (*a*) of the Transfer of Property Act. As no form is required to operate as a mortgage, the intention of the parties has to be gathered from a fair and reasonable reading of the entire instrument, which ought to be the basis to find out whether a given instrument is a mortgage or not, and the literal sense of the expression used does not generally serve as a guide for the interpretation of deeds; but it is the real meaning of the transaction which has to be gathered as a whole. That is the proper test to find out the character of the document. The definition of a mortgage deed under the Indian Stamp Act reads as follows:–

> " 'Mortgage deed' includes every instrument whereby, for the purpose of securing money advanced, or to be advanced by way of loan, or an existing or future debt or the performance of an engagement, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property."

The only essential differrence between the two Acts appears to be that whilst under the Transfer of Property Act mortgages relate to immovable property alone, the Stamp Act applies that term to the transfer of both movable and immovable properties. We should also bear in mind that under section 100 of the Transfer of Property Act, a charge created over immovable property, notwithstanding the fact that the transaction does not amount to a mortgage, the Act makes all the provision which apply to a simple mortgage as being applicable to such created charges. The primordial ingredient which would make an instrument as a mortgage deed under the Stamp Act is that there should be a transfer of a right over specified property, not only for the purpose of securing money advanced or to be advanced by way of a loan, but also when the transfer is effected for the performance of an engagement. When once the property is described distinctly and a charge is created over such defined property not only for payment of a debt, which is admittedly due by the transferor, but also for the performance of an engagement as undertaken by him under the instrument, it would be undoubtedly a mortgage deed. If the given instrument is a mortgage deed, then stamp duty as contemplated in Article 40 of the Schedule I of the Indian Stamp Act would be attracted. Under Article 40 it appears to us that even a security bond hypothecating a property executed in favour of the Court under Order 41, rules 5 and 6 of the Code of Civil Procedure, would attract stamp duty under Article 40, provided the security bond involves a mortgage over immovable property.

7. In *Abubacker Labbai* v. *Chinnathambi Rowther*,[1] a Full Bench of our Court presided over by the then Chief Justice Leach, considered the character of a security bond executed by two sureties of an insolvent for his due appearance in the insolvency proceedings contemporaneously hypothecating immovable property under the bond. The question arose whether such an instrument was to be stamped under Article 57 of Schedule I to the Stamp Act or under Article 40 therein. The Court was of the view that the bond must be stamped under Article 40 of the Indian Stamp Act, as it was not a bond for the due performance of a contract by the insolvent, but to carry out the insolvent's duty to be in Court when required. The quintessence of the subject seems to be that once the intention of the executant of a deed is clear that he was mortgaging immovable property or offering it as security or as a charge for the due performance of an engagement undertaken by him under it then it would undoubtedly be a mortgage deed, which has to be stamped under Article 40 of the Indian Stamp Act.

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1. (1938) 1 M.L.J. 159: I.L.R. (1938) Mad. 460; 47 L.W. 154; A.I.R. 1938. Mad. 262.

8. Though Article 57 deals with security bond or mortgage deed, yet it is not all bonds that are commonly called security bonds that fall under this Article. But it should satisfy the purposes enumerated in Article 57. It should be by way of security for the due execution of an office, or to account for money or other property received by virtue thereof, or executed by a surety to secure the due performance of a contract. We have already referred to a Full Bench decision of our Court in *Abubacker Labbai* v. *Chinnathambi Rowther*[1] which considered the scope of a bond executed by a surety. Therefore, a strict interpretation is necessary to find out whether an instrument would come under Article 57 of Schedule I to the Indian Stamp Act.

9. In so far as the undertaking affidavit is concerned it would not come under the various heads specifically enumerated in Article 57 for Thiru Savariappam Remi was not executing the bond for due execution of an office or to account for money or for other property received by virtue thereof. But, on the other hand, he executed the deed for purpose of securing the repayment of the prized chit amount received by him, for which purpose he has created an express charge over the property described in the schedule to the undertaking affidavit. In more than one place, Thiru Savariappam Remi would say that he is undertaking to repay the debt payable by him to the chit fund company, after creating a first charge over his property. In fact, at one place he would say that the schedule property shall be subject to a first charge for collection of the amount due to the chit fund company. He would also say that in addition to the securities given by way of a promissory note he has given a charge over the property. This undoubtedly creates a transfer of an interest in an immovable property. Even otherwise it would, as the petitioner says, satisfy the definition of a mortgage deed as defined in section 2 (17) of the Indian Stamp Act, wherein Thiru Savariappam Remi has transferred his right over a specified immovable property for the performance of an engagement undertaken by him under the instrument.

10. The totality of the impression gained by us on a reading of the instrument and after ascertaining the intention of the parties, makes it clear that the undertaking affidavit has to be charged as a mortgage deed, which has to suffer stamp duty as prescribed under Article 40 of Schedule I of the Indian Stamp Act.

11. We may also refer in passing to certain observations of Ramesam, J., in *Natesa Aiyar* v. *Sahasranama Iyer*.[1] That was a case where a bond or a kootchit deed was executed by a person similarly placed as Thiru Savariappam Remi in favour of a chit fund company mortgaging two items of his properties for the due performance of his obligations in connection with the chit transactions. The contention before the learned Judges was that the kootchit amounted only to a charge and not to a mortgage. Ramesam, J., expressed thus:—

> "It seems to me to fall within the definition of section 58 of the Transfer of Property Act, because it effects security of the property for the due performance of an engagement which may result in a pecuniary liability like simple mortgage bonds, which are usually executed in this presidency."

We respectfully adopt this view.

12. Having examined the document in full and for the reasons indicated above, we are of opinion that Article 40 and not Article 57 of Schedule I to the Stamp Act is the appropriate article applicable to the instant case. We answer the reference accordingly.

R.S. —— *Appeal allowed.*

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1. (1938) 1 M.L.J. 159: I.L.R. (1938) Mad. 460: 47 L.W. 154: A.I.R. 1938 Mad. 262.

1. (1927) 53 M.L.J. 550: A.I.R. 1927 Mad. 773.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail and S. Natarajan, JJ.*

State Bank of India, Madras ... *Appellant**

v.

The Official Liquidator, representing Straps (India) Private Limited Madras-1 ... *Respondent.*

Companies Act (1 of 1956), section 446 and Indian Companies Act (VII of 1913), section 171 —Plaintiff advancing moneys to a firm with mortgage of its property—Assets and liabilities of firm taken over by company under agreement—Winding up of company by Court order—Official liquidator appointed liquidator of company—Suit against firm and official liquidator by plaintiff for recovery of money—Leave to sue liquidator not obtained nor official liquidator properly described in cause title—Subsequent application by plaintiff for leave to sue, if maintainable.

The plaintiff originally filed a suit against 10 defendants, the first of them a firm, defendants 2 to 9 its partners and the 10th defendant the official liquidator, for recovery of a sum of money and in default for a sale of the concerned mortgage property with rights reserved to proceed against defendants 2 to 9 personally for the balance if any, after adjusting the sale proceeds It was alleged that subsequent to the execution of the mortgage by the firm, the firm had handed over possession of its property to a company in pursuance of an agreement under which the latter had agreed to take over the assets and liabilities of the firm. The company was later on directed to be wound up by Court order on a petition by one of its shareholders. The official liquidator was appointed liquidator of the company. He was therefore impleaded as the 10th defendant. The official liquidator contended that he was not properly described and was not impleaded as representing the company in liquidation, and that the suit was not maintainable against him for want of leave of the High Court which had ordered the winding-up, for commencing the present action, in accrodance with the provisions of section 446 of the Companies Act, 1956. The plaintiff, therefore, filed applications for leave to amend the cause title so as to make the official liquidator to represent the company in liquidation and for leave to sue. The application for leave to sue was dismissed on the ground that under section 446 leave to sue was a condition precedent to the filing of the suit after a winding-up order had been made and such leave cannot be granted after the suit was filed. On appeal against the order refusing to grant leave:

Held: It is clear from the decision of the Supreme Court in *Bansidhar Shankarlal v. Md. Ibrahim and another*, (1971) Tax.L.R. 740: (1971) 2 S.C.R. 476: 41 Comp. Cas. 21: A.I.R. 1971 S.C. 1292 that if the matter was governed by section 171 of the Companies Act, 1913 (the predecessor of section 446 of the 1956 Act) the plaintiff-appellant in the present case can apply for and obtain the leave of the Court for continuing the suit though leave was not obtained before the institution of the suit, and the failure to obtain leave before the institution will not entail dismissal of the suit. The suit will only be regarded as ineffective till leave is obtained. [*Para.* 5.]

There is undoubtedly a difference in the language of section 171 of the Companies Act, 1913, and section 446 of the Companies Act, 1956. While in section 171 the expression "no suit or other legal proceeding shall be proceeded against or commenced against the company" is used, the language in section 446 is "no suit or other legal proceeding shall be commenced or if pending at the date of the winding up order shall be proceeded against the company". The change in language, however, in section 446 has not effected any change in the legal position gathered by the Supreme Court from the language of section 171 of the former Act and the change in the language of section 446 of the present Act is by way of amplification, clarification or elaboration of the former Act rather than an alteration, amendment or departure. [*Para.* 11.]

To achieve the object and effectuate the purpose of the section, namely, that the Court that ordered the winding-up should retain control of proceedings which may be pending against the company or may be initiated against it so that the affairs of the company are administered equitably and in an orderly manner, it is not necessary to hold that the obtaining of leave is a condition precedent to the institution of a suit or other legal proceeding and if such suit or other proceeding is instituted without obtaining leave the same

*O.S.A. No. 72 of 1977, 19*th January*, 1978.

cannot be rendered effective by subsequently applying for leave. [*Para.* 12.]

The change in the language of section 446 of the present Act is only a drafting change and is not intended to constitute a deliberate departure from the legal consequences flowing from section 171 of the former Act. [*Para.* 13.]

The application filed by the plaintiff-appellant for obtaining leave of the Court for proceeding with the suit it had already filed was competent and the Court had power to grant such leave so as to render the suit already filed effective from the date of granting such leave.

Cases referred to:—

K. Vadivelu v. *The Official Liquidator,* (1971) Tax. L.R. 768 84 L.W. 116: A.I R. 1971 Mad. 311; *Associated Industrial and Engineering Corporation Ltd.*, In re (*in Liquidation Burmah Shell Oil Storage and Distributing Co. of India Ltd.* v *Associated Industrial and Engineering Corporation Ltd.*, (1974) 44 Comp. Cas. 488: *Bansidhar Sankarlal* v. *Md. Ibrahim*, (1971) Tax. L.R. 740: (1971) 2 S C.R. 476: 41 Comp. Cas. 21: A.I.R. 1971 S C. 1292; *Eastern Steamship* (*P.*) *Ltd.* v. *Pueto* (*P.*) *Ltd.*, (1971) 41 Comp. Cas. 43; *Star Engineering Works Ltd.* v. *Official Liquidator of the Krishnakumar Mills Co. Ltd.*, (*in Liquidation*), 1974 Comp. Cas. 30.

Appeal under Clause 15 of the Letters Patent and Order 36 of the original Side Rules of the High Court, against the Order dated 23rd June, 1977 of Ramaprasada Rao, J. in the exercise of the ordinary Original Civil Jurisdiction of the High Court, Madras in

Company Application No. 551 of 1976

in

Company Petition No. 71 of 1972

In the matter of the Companies Act, 1956 and In the matter of Straps (India) Private Ltd.

Between

State Bank of India, Madras .. *Applicant*

And

The Official Liquidator, representing Straps (India) Private Ltd., Madras. .. *Respondent.*

M. Raghavan, for Appellant.

A.N. Rangaswami, for Respondent.

The Judgment of the Court was pronounced by

Ismail, J.—This is an appeal against the order of Ramaprasada Rao, J. dated 23rd June, 1977 made in Company Application No. 551 of 1976. The applicant in the Company Application is the appellant which is the State Bank of India Madras-1 The said Bank instituted a suit, O.S. No. 117 of 1974 on the file of the Court of the Subordinate Judge, Chingleput, which has been transferred to and numbered as C.S. No. 233 of 1974 on the original side of this Court. The suit was originally instituted against 10 defendants, the first defendant being one M/s. Chandra Paper Band, defendants 2 to 9 being the partners of the said first defendant firm and the 10th defendant being the Official Liquidator, High Court, Madras. The suit was for recovery of a sum of Rs 1,99,170.04 with further interest at 10½ per cent per annum on Rs. 1,25,700-28 at half yearly rests and at 9¼ per cent per annum on Rs. 58,797.85 at monthly rests, from the defendants and in default for a direction for the sale of the mortgaged property set out in Schedule A to the plaint and application of the net proceeds thereof in payment of the amount to be decreed with rights reserved in the appellant to proceed against defendants 2 to 9 personally for the balance, if any, due after adjustment of the proceeds of such sale to the suit claim. Such a relief was prayed for on the allegation that the first defendant by its partners, defendants 2 to 9, applied to the appellant for grant of credit facilities and to secure the term loan, the first defendant by its partners, defendants 2 to 9, executed a registered mortgage over the first defendant's factory, land and buildings, described in schedule A to the plaint and subsequently the first defendant was said to have handed over possession of the assets to Messrs. Straps (India) Private Ltd., in pursuance of an agreement, the first defendant had with the said company under which the company agreed to take over the assets and liabilities of the first defendant. The said Messrs. Straps (India) Private Ltd., was ordered to be wound up by this Court by an order dated 7th February, 1973 on a company petition, C.P. No. 71 of 1972, filed by one of the shareholders. This fact has been referred to in the plaint itself and that is the reason why the Official Liquidator, High Court. Madras, was impleaded as the 10th defendant in the suit. In the written statement filed by the 10th defendant, among other contentions, the 10th defendant claimed that the Official

Liquidator had not been properly described, that the Official Liquidator as such could not have been impleaded as a party, that he was not impleaded as representing Messrs. Straps (India) Private Ltd., in Liquidation and that the suit itself was not maintainable against him, and leave of the High Court, which ordered the winding up of the company had been obtained for commencing the present action in accordance with the provisions of section 446 of the Companies Act, 1956, which will be referred to hereinafter as "the present Act". These two defences gave rise to two applications by the plaintiff-appellant. One was to amend the cause title so as to make the Official Liquidator represent Messrs. Straps (India) Private Ltd. in Liquidation. The other was for leave to sue the said Messrs Straps (India) Private Ltd. in Liquidation. Company Application No. 551 of 1976 is concerned with the said leave to sue the company in liquidation. The application filed by the appellant herein for the amendment of the cause title so as to make the Official Liquidator represent Messrs. Straps (India) Private Ltd., in Liquidation was allowed. C.A. No 551 of 1976, namely, the application for leave to sue the company in liquidation was dismissed by the impugned order. The ground for the said dismissal was that under section 446 of the present Act, as it stands, no leave can be granted in respect of a suit already commenced after the order of liquidation without obtaining such leave. In short the basis of the dismissal of the application was that in respect of a suit instituted after an order of winding up has been passed, the obtaining of leave of the Court which ordered the winding up is a condition precedent for the institution of the suit under section 446 of the present Act and such leave cannot be granted after the suit has actually been instituted without obtaining the leave of the Court. For coming to this conclusion, Ramaprasada Rao, J., relied upon the earlier decisions of Palaniswamy, J., in *K.Vadivelu and others* v. *The Official Liquidator, Madras*[1] and *Associated Industrial and Engineering Corporation Ltd.*, In re *(In Liquidation), Burmah Shell Oil Storage and Distributing Co. of India Ltd* v. *Associated Industrial and Engineering Corporation Ltd*[2] In the latter case, Palaniswamy, J., after an elaborate consideration of section 446 of the present Act and section 171 of the Indian Companies Act, 1913 hereinafter referred to as "the former Act", and section 231 of the English Companies Act, 1948, corresponding to section 171 of the former Act, came to the conclusion that even though section 171 of the former Act was capable of authorising the filing of an application for leave even after the suit has been instituted without such leave, the language of section 446 of the present Act did not authorise such leave being obtained after the suit has been actually instituted and that in this respect section 446 of the present Act constituted a deliberate and definite departure. It is the correctness of the conclusion of Ramaprasada Rao, J., based as it is on the decision of Palaniswamy, J., that is the subject-matter of the present appeal.

2. It is desirable to set out in parallel columns the above said three provisions, namely, section 446 of the present Act, section 171 of the former Act and section 231 of the English Companies Act, 1948, as has been done by Palaniswamy, J., himself in his judgment in *Associated Industrial and Engineering Corporation Ltd*, In re *(In liquidation) Burmah Shell oil Storage and Distributing Co. of India Ltd.* v. *Associated Industrial Engineering Coproration Ltd.*[2]

1956 *Act*	1913 *Act*	*English Act of* 1948
446. *Suits stayed on winding up order*: When a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator,	171. *Suits stayed on winding up order*: When a winding up order has been made (or a provisional liquidator has been appointed) no suit or other legal proceeding shall be	231. *Actions stayed on winding up order*: When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with

1. (1971) Tax L.R. 768: 84 L.W. 116: A.I.R. 1971 Mad. 311.
2. (1974) 44 Comp. Cas. 488.

1956 *Act*	1913 *Act*	*English Act of* 1948
no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose..........	proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.	or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.

A comparison of the three sections will show that section 171 of the former Act is practically identical with section 231 of the English Companies Act, 1948 except for the fact that the English Act uses the word, 'action' while section 171 of the former Act uses the word 'suit'. As far as section 446 of the present Act is concerned, the language is more elaborate than the one contained in section 171 of the former Act. Section 171 of the former Act uses the expression, "shall be proceeded with or commenced against the company" without specifying as to what suit or proceeding shall be governed by the expression "shall be proceeded with" and what suit or proceeding shall be governed by the expression "shall be commenced" and the language is compendious and condensed. On the other hand, section 446, of the present Act distributes these two expressions namely, the expression "shall be commenced" qualifying "suit or other legal proceeding" to be instituted after the winding-up order has been made or the official liquidator has been appointed as provisional liquidator has been appointed as provisional liquidator and the expression "shall be proceeded with' qualifying "suit or other legal proceeding pending at the date of the winding-up order". There are two other differences between section 171 of the former Act and section 446 of the present Act one of which does not make any difference in substance and the other is of no consequence for the present discussion. The first is, section 171 of the former Act uses the expression "when a provisional liquidator has been appointed", while section 446 of the present Act uses the expression, "when the official liquidator has been appointed as provisional liquidator". This is the result of an official liquidator being permanently appointed under the present Act pursuant to section 448 (1) of the present Act, to be attached to each High Court. The second difference is that when the opening limb of section 446 (1) uses the expression, "when a winding-up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced", the alternative limb of the same provision uses the expression, "if pending at the date of the winding-up order, shall be proceeded with against the company". Thus, the alternative limb does not state, "if pending at the date of the winding-up order or appointment of the official liquidator as provisional liquidator', which difference alone, as we have stated before, is not of any consequence to the present case.

3. The point that has to be considered is, whether the particuler difference in the language of section 446 of the present Act is intended to make a departure in substance from what was provided in section 171 of the former Act. As far as section 171 of the former Act, is concerned there is a direct decision of the Supreme Court in *Bansidhar Sankarlal* v. *Md. Ibrahim and another*.[1] In that case, one Md. Ibrahim instituted an action in the Court of the Subordinate Judge, Alipore, for a decree in ejectment in respect of land occupied by the Luxmi Spinning and Weaving Mills Ltd., as his tenant. The suit was decreed on 1st October, 1953. Before the suit was decreed, on 31st, January, 1951 the company had executed a deed in favour of Bansidhar mortgaging its fixed assets for securing repayment of Rs.1 25 000. After the decree in the suit, the company executed on 21st January, 1954, a second deed also in favour of Bansidhar mortgaging the fixed

1. (1971) 2 S.C.R. 476: (1971) Tax. L.R. 740; 41 Comp. Cas. 21; A.I.R. 1971 S.C. 1292.

assets for repayment of an additional sum of Rs. 2,00,000. The decree of the trial Court in the suit of Md. Ibrahim was confirmed on 4th August, 1954. Against that decree the company and Bansidhar preferred Second Appeal No. 1380 of 1954 to the High Court of Calcutta. Bansidhar also filed a suit in the High Court of Calcutta on its original side to enforce the two mortgages in his favour and obtained a preliminary mortgage decree in the suit on 13th May, 1955 Another creditor of the Company applied for and obtained on 22nd August, 1955 an order directing that the company be wound up. The liquidators of the Company and Bansidhar prosecuted the Second Appeal No. 1380 of 1954. The decree of the District Court was confirmed by the High Court in its appellate jurisdiction on 22nd February, 1958. Thus, it will be seen that the order for winding up of the company was passed during the pendency of the second appeal on the file of the High Court and the second appeal itself was prosecuted by the liquidators of the company and Bansidhar. After the dismissal of the second appeal, the plaintiff-decreeholder applied for execution of the decree against the company without obtaining leave of the High Court of Calcutta under section 171 of the former Act. On 17th December, 1958, Bansidhar filed a petition contending that the application for enforcement of the decree was not maintainable without the leave of the High Court which ordered that the company be wound up. On the motion of the decree-holder, the Company Judge granted leave to execute the decree in Second Appeal No. 1380 of 1954. The executing Court dismissed the application filed by Bansidhar and the order of dismissal was confirmed by the Additional District Judge and by the High Court in second appeal. Bansidhar filed a petition for a certificate for appeal to the Supreme Court under Article 133 (1) (*b*) and (*c*) of the Constitution and the said petition was rejected by the High Court. Bansidhar then preferred two petitions for special leave to the Supreme Court—one against the order of the High Court dismissing his second appeal against the order in the execution proceedings, and the other against the order of the High Court refusing to certify the appeal under Article 133 (1) (*b*) and (*c*) of the Constitution. The Supreme Court dismissed the petition against the order of the High Court in second appeal and granted special leave to appeal against the order of the High Court refusing to certify the case.

4. It is in the course of the judgment in that appeal the Supreme Court had to consider the scope of section 171 of the former Act and in that context, it referred to the conflicting decisions of the High Courts on the question whether an application for leave under section 171 can be made after a suit or other legal proceeding has been instituted without obtaining such leave on the date of the institution. As we have pointed out already, the liquidators prosecuted Second Appeal No. 1380 of 1954 and the Supreme Court observed that there was no evidence on record whether the liquidators obtained sanction of the Court under section 179 (1) (*a*) of the former Act, but that there was no reason to suppose that the liquidators did not obtain the sanction of the Court. We have also pointed out the fact that when the decree-holder sought to execute the decree. Bansidhar took up the stand that the execution proceedings could not have been proceeded with without obtaining the leave of the Court and such a contention of Bansidhar was rejected by the Subordinate Courts as well as the High Court. Dealing with that position, the Supreme Court pointed out two things. One was that the execution petition was only a continuation of the suit and that after the sanction of the High Court had been obtained for the prosecution of the suit, it would be plainly unnecessary to obtain fresh sanction to the institution of the execution proceedings at the instance of the successful party. In this context Supreme Court observed:

> "It would be giving effect to a technicality divorced from the true object of the section to hold that even in a suit filed or prosecuted with the sanction of the Court, the decree may not be enforced by a successful party without leave under section 171 of the Act."

The second thing pointed out by the Supreme Court was that failure to obtain leave before institution of the proceedings did not entail dismissal of the proceedings and such leave could be applied for and obtained subsequent to the institution of the proceedings. The Supreme Court observed:

> "Even granting that sanction under section 179 does not dispense with the leave under section 171 of the Act, to institute a proceeding in execution against a company ordered to be wound up, we do not think that there is anything in the Act which makes the leave a condition precedent to the institution of a proceeding in execution of a

decree against the company and failure to obtain leave before institution of the proceeding entails dismissal of the proceeding. The suit or proceeding instituted without leave of the Court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed instituted on the date granting leave."

While dealing with this position, the Supreme Court also pointed out the object of providing for obtaining such a leave. After extracting section 171 of the former Act, the Supreme Court observed:

"This section is in terms analogous to section 231 of the English Companies Act, 1948 (11 and 12 Geo. 6, Ch. 38). The object of section 171 is plain. It is intended to ensure that the assets of a company ordered to be wound up by the Court shall be administered for the benefit of all the creditors, and that some creditors only shall not obtain an advantage over others by instituting or prosecuting proceedings against the Company. The section is intended to maintain control of the Court which has made an order for winding up on proceedings which may be pending against the Company or may be initiated after the order of winding up, and the Court may remain seized of all those matters so that its affairs are administered equitably and in an orderly fashion".

The Supreme Court extracted with approval the following observation contained in Buckley on the Companies Act, 13th Edition at page 490:

"Leave to continue after winding up a debenture-holder s action, whether previously or subsequently commenced, will be given unless the liquidator is able and willing to give in the winding up the relief which could be obtained in the motion."

5. In the present case, the suit has been instituted after the winding up of the company has been ordered and as a matter of fact the plaint itself refers to the same But no leave of the Court was obtained before the institution of the suit. If section 171 of the former Act was in force, the decision of the Supreme Court referred to above makes it clear that the appellant herein can apply for and obtain the leave of the Court for continuing the suit even though leave was not obtained before its institution and the failure to obtain leave before the institution of the suit will not entail dismissal of the suit and the suit will be regarded only as ineffective until leave is granted. There is no controversy on this aspect as between the parties before us.

6. The only other question is, whether section 446 of the present Act which replaced section 171 of the former Act made any difference or departure in this legal position.

7. In the first place, we shall deal with the two decisions of Palaniswamy, J., which have been mentioned by us already. The earlier decision of Palaniswamy, J., namely, *K. Vadivelu and others* v. *The Official Liquidator, Madras*[1] related to a case where the suit was instituted after the order of winding up was made without obtaining the leave of the Court and on an objection raised by the Official Liquidator based on section 446 of the present Act, the plaintiff filed an application praying for leave with retrospective effect to prosecute the suit. Palaniswamy, J., held that such leave could not be granted. For coming to this conclusion, the learned Judge referred to certain decisions of this Court as well as other Courts and also certain decisions bearing on the language contained in section 17 of the Presidency Towns Insolvency Act and section 28 (2) of the Provincial Insolvency Act, imposing a ban on creditors to whom the insolvent is indebted, from commencing any suit or other legal proceeding against the property of the insolvent in respect of the debt except with the leave of the Insolvency Court However, the learned Judge (Palaniswamy, J.) had not dealt with the decision of the Supreme Court to which we have already drawn attention.

8. In the later decision, namely, *Associated Industrial and Engineering Corporation Ltd*, In re *(In Liquidation) Burmah Shell Oil Storage and Distributing Co. of India Ltd.* v. *Associated Industrial and Engineering Corporation Ltd.*[2] the learned Judge has expressly dealt with the decision of the Supreme Court. After referring to the decision of the Supreme Court and the language of section 171 of the former Act, the learned Judge proceeded to State:

"The question is whether the aforesaid principle should be applied even to section 446

1. (1971) 1 Tax. L.R. 768: 84 L.W. 116: A.I.R. 1971 Mad. 311.

2. (1974) 44 Comp. Cas. 488.

of the 1956 Act. In enacting this section, the Legislature has made a substantial change in the law contained in section 171 of the 1913 Act. The difference in the language of section 446 and that of section 171 calls for careful examination. In section 171 of the 1913 Act, the word 'commenced' occurred after the expression 'proceeded with'. But in section 446 of the 1956 Act that word precedes the expression 'or if pending at the date of the winding up order' and thereafter occurs the expression 'shall be proceeded with.' It is not merely a case of interchanging the places of the words 'commenced' and 'proceeded with' as occupied by them in section 171 of the 1913 Act. After making this change, the Legislature has also added the expression 'or pending at the date of the winding up order' after the word 'commenced'. Thus in effecting this change, the Legislature has clearly comprehended two situations.

"The first is commencement of a suit or other legal proceeding and the second is proceeding with a suit or other legal proceeding if such suit or proceeding was pending at the date of the winding-up order. In the latter case, the proceeding must be a proceeding pending at the date of the winding up order. Only in such a case the leave of the Court for further proceeding with the proceeding would arise. But in the case of a proceeding to be commenced, there is no question of proceeding being proceeded with. If a proceeding is commenced without the leave of the Court and subsequent to the commencement, leave is asked for the continuation of that proceeding, it would not be a proceeding pending at the date of the winding-up order within the meaning of section 446 of the 1956 Act, and obviously no leave can be granted under section 446 for that purpose. This conclusion is irresistible, having regard to the use of the expression 'pending at the date of the winding up order'. It should be presumed that the Legislature deliberately introduced these words in enacting section 446 even though sectio 171 was in the statute book for several decades. Construing the plain language adopted by the Legislature, it follows that if a proceeding is commenced without obtaining the leave of the Court previously, no leave could be granted for proceeding with that proceeding, as it was not a proceeding pending at the date of the winding-up order. If it were to be held that even if a proceeding is instituted without the leave of the Court, it could be permitted to be proceeded with by granting leave, then the expression 'if pending at the date of the winding-up orders' would be without any meaning and rendered purposeless. That could not have been the intention of the Legislature in making this change in the law. The obvious intention of the Legislature is that leave could be granted to commence a proceeding only if leave is sought for before the commencement of the proceeding and that leave could be granted to proceed with a proceeding only if the proceeding was pending at the date of the winding up order. That is the only rational way of interpreting the language employed in section 446".

It is this decision of Palaniswamy, J., which has been followed by Ramaprasada Rao, J., in the order under appeal.

9. Our attention was drawn to two other decisions dealing with section 446 of the present Act. One is that of a division Bench of the Bombay High Court in *Eastern Steamship Private Ltd.* v. *Pucto Private Ltd. and another*[1]. This decision, which also did not refer to the decision of the Supreme Court mentioned already, held that section 446 of the present Act had made a departure from section 171 of the former Act. The learned Judges also relied on decisions interpreting section 17 of the Presidency Towns Insolvency Act, 1909, as well as section 28 (2) of the Provincial Insolvency Act, 1920. The learned Judges stated:

"We are of the view that section 446 of the Companies Act 1956, makes a departure from section 171 of the Indian Companies Act, 1913. Section 171 easily lent itself to the interpretation that both in cases of suits commenced before or after the winding up order leave could be taken after the winding up order. Section 446, however, separates the two kinds of suits. It provides that only in the case of suits pending at the date of the order of winding up leave could be taken to proceed with the suit. It further provides that no suit shall be commenced against the company after the winding up order has been made except by leave of the Court. In such cases leave could only be granted before the suit is commenced and no leave can be granted to

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1. (1971) 41 Comp. Cas. 43.

continue it or to proceed with it if it is commenced after the date of the winding up order. We are also of the view that in India a suit is commenced on the presentation of a plaint in Court".

10. The other decision is that of a Division Bench of the Gujarat High Court in *Star Engineering Works Ltd.* v *Official Liquidator of the Krishnakumar Mills Company Ltd (in Liquidation) and others*[1]. This decision refers to the decision of the Supreme Court as well as the decision of the Bombay High Court to which we have made reference and holds that the decision of the Supreme Court applied to a case covered by section 446 of the present Act and the learned Judges differed from the decision of the Bombay High Court. The learned Judges observed:

"With respect to the learned Judges of the Bombay High Court, we are unable to agree with the conclusion reached by them regarding the difference between the provisions of section 446 of the Companies Act, 1956, and section 171 of the Indian Companies Act, 1913. What was in a condensed form in section 171 of the 1913 Act has been expanded in more elaborate language in section 446 of the 1956 Act but the substance of both the provisions remains the same and the legal position is not at all changed by the change in the terminology of the new section. We may point out that in the Supreme Court decision in *Bansidhar Shankarlal Mohd* v. *Ibrahim*[2], Shah, J., as he then was, delivering the judgment of the Court, has observed at page 23.

" The question sought to be raised in the proposed appeal, it was urged, was of general or public importance. In any case it was contended that there is conflict of opinion among the Courts in India on the true interpretation of section 171 of the Indian Companies Act, 1956 (which replaced section 71 of the Act of 1913)......'
Therefore, this passage of the Supreme Court indicates that, according to the Supreme Court, section 446 of the 1956 Act, replaced section 171 of the 1913 Act, and the two sections, according to the Supreme Court were *in pari materia*. Even apart from these observations from the judgment of the Supreme Court which was primarily dealing with the provisions of section 171 of the 1913 Act, as we have pointed out above, there is no difference in substance between section 446 of the 1956 Act and section 171 of the 1913 Act. There is a difference only in framing the language of the section and in putting in more elaborate terms what was in a condensed form in the 1913 Act. Under these circumstances this contention urged on behalf of the liquidator must be rejected."

With great respect we are unable to agree with the learned Judges of the Gujarat High Court that the extract from the judgment of the Supreme Court indicated that according to the Supreme Court, the two provisions, namely, section 446 of the present Act and section 171 of the former Act were *in pari materia*. In our view, passage extracted from the judgment of the Supreme Court does not indicate any such thing. As we have pointed out already, the appeal before the Supreme Court was against the order of the High Court refusing to certify a case as fit for appeal to the Supreme Court under Article 133 (1) (*b*) and (*c*) of the Constitution. In that context a contention was urged before the Supreme Court and it was that contention which was contained in the passage extracted by the learned Judges of the Gujarat High Court. That extract itself will clearly show that the Supreme Court was only referring to a contention that the High Court should have granted the certificate applied for under Article 133 (1) (*b*) or (*c*) or *both* the clauses, since there was conflicting opinion among the Courts in India on the true interpretation of section 171 of the former Act, and section 446 of the present Act. It was the only place where the Supreme Court referred to section 446 of the present Act and nowhere the Court had held that the language of section 171 of the former Act and that of section 446 of the present Act was *in pari materia*. But that is not to say that we are not in agreement with the conclusion of the Gujarat High Court on the scope and intendment of section 446 of the present Act.

11. As we have pointed out already, there is undoubtedly a difference in the language of section 171 of the former Act and that of section 446 of the present Act. The only question for consideration is, whether this difference in language has effected a change in the legal position, in other words, whether the legal position continues as interpreted by the

1. (1977) 47 Comp. Cas. 30.
2. (1971) 41 Comp. Cas. 21 (S.C.): 1971 Tax. L.R. 740: (1971) 2 S.C.R 476: A.I.R. 1971 S.C. 1292.

Supreme Court with reference to the language of section 171 of the former Act, notwithstanding the change in the language of section 446 of the present Act. After a careful consideration, we are of the opinion that the change in the language of section 446 of the present Act has not effected a change in the legal position gathered by the Supreme Court from the language of section 171 of the former Act and that the change in the language of section 446 of the present Act is by way of amplification, clarification, or elaboration of the position contained in section 171 of the former Act, rather than alteration, amendment or departure.

12. For coming to the above conclusion, we have taken into account the purpose of enacting a provision like section 171 of the former Act or section 446 of the present Act. The purpose and object of the provision have been set out by the Supreme Court itself in the extract which we have already given from its judgment. For the purpose of achieving that object and effectuating that purpose, it is not necessary to hold that obtaining of leave is a condition precedent to the institution of the suit or other legal proceeding and if such suit or other legal proceeding is instituted without obtaining leave, the same cannot be rendered effective by subsequently applying for and obtaining leave.

13. The second circumstance which has influenced us in coming to this conclusion is as follows: As we have indicated already, the commencing of a suit or other legal proceeding under that section, namely, section 446 (1) of the present Act, is envisaged in two contingencies. One is, when a winding up order has been made and the other is when the official liquidator has been appointed as provisional liquidator. As far as the winding up order is concerned, the consequence of a winding up order are dealt with in section 444 and 445 of the present Act. Under section 445 (1) of the present Act, "On the making of a winding up order, it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the Registrar a certified copy of the order, within thirty days from the date of the making of the order." Under section 445 (2) of the present Act, "on the filing of a certified copy of the winding up order, the Registrar shall make a minute thereof in his books relating to the company, and shall notify in the Official Gazette that such an order has been made." Consequently, in view of this provision for notification of the passing of a winding up order in the official gazette, it may be stated that every one must be taken to have notice of such winding up order, even though such notice can be said to have been taken only on the date when it is notified in the official gazette. However, with regard to the appointment of official liquidator as provisional liquidator, there is no such provision for any notification. It is section 450 of the present Act which deals with the appointment and powers of provisional liquidator and section 450 (1) states that at any time after the presentation of a winding up petition and before the making of a winding up order, the Court may appoint the official liquidator to be liquidator provisionally. But there is no provision in the Act for notifying the appointment of Official Liquidator as provisional liquidator in the official gazette, though the contingencies of both the passing of the winding up order and the appointment of Official Liquidator as provisional liquidator are treated on the same footing in section 446 (1) of the present Act. Suppose in a particular case, without the knowledge that the Official Liquidator has been appointed as provisional liquidator, a person who has got a claim against a company files a suit, can it be contended that such a suit without obtaining the leave of the Court should be dismissed, because obtaining of such leave was a condition precedent to the institution of the suit? If such a serious consequences is to result, what is the provision or principle on the basis of which one can impute knowledge of such appointment of Official Liquidator as Provisional Liquidator to the plaintiff in such a suit? Could it have been the intention of the Parliament that an innocent person's right to institute a suit against a company should be thwarted for no fault of his own? We may also take another case. A company, though its registered office is situate in one place, may have places of business throughout the country and a person is entitled to institute a suit against such company where a part of the cause of action arises. Suppose a person who lives far away from the place where the Court passing an order of winding up is situate and without any knowledge of the fact that the Official Liquidator has been appointed provisional liquidator, institutes a suit in a distant Court, can it be contended that such a suit should be dismissed, simply because the plaintiff had not obtained the leave of the Court which passed the order winding up the company for instituting such a suit? We are clearly of the opinion that

no such consequence is intended by the Parliament and could be attributed to it. Even with regard to the contingency of passing of a winding-up order, the statute itself contemplates a time lag between the passing of that order and the notification of the same in the official gazette. We have already referred to section 445 (1) of the present Act requiring the petitioner in the winding up proceedings and the company to file with the Registrar a certified copy of the order within 30 days from the date of the making of the order. The expression 'thirty days' was substituted for the expression 'one month' with effect from 15th September, 1965, by the amendment Act, Central Act XXXI of 1965. However, sub-section (1 A) of the same section provides that in computing the period of thirty days from the date of the making of a winding up order under sub-section (1), the time requisite for obtaining a certified copy of the order shall be excluded. Thus, a certified copy itself may be filed before the Registrar after several days or even months after the Court has actually passed the winding up order. Suppose a plaintiff files a suit on the very next day following the date on which the Court has passed the winding up order, can it be contended that such a suit should be dismissed because no leave to institute a suit has been obtained, even though the plaintiff in the suit had no means of knowing that a winding up order had been passed? To construe section 446 of the present Act as dealing only with two categories of suits and legal proceedings, namely, those that are instituted subsequent to the order of winding up of the company and those that are pending at the date of the winding up order will naturally exclude the suits or other proceedings simultaneously instituted. Suppose in a particular case without the knowledge of the pendency of any petition for winding up a person happens to institute a suit on the very day on which the winding up order is passed by the Court, a question will arise, into which category the said suit can be classified, namely, whether it can be classified as a suit instituted after the winding up order has been passed or a suit which was pending at the date of the winding up order. Really speaking, such simultaneous suit will not fall within either of the two categories and therefore will be outside the scope of section 446 itself. If so, with reference to such a suits the very object of the Parliament that the Court which passes the order of winding up of a company should have control over all such proceedings will be defeated. Under these circumstances to impute to the Parliament a deliberate departure from the legal consequence of section 171 of the former Act, when it charged the language of section 446 of the present Act will certainly lead to such serious and unintended results. It is worthwhile pointing out that if a person's remedy to proceed against a company for the purpose of enforcing his or its rights is sought to be taken away by such an interpretation of section 446 of the present Act, such a construction will constitute a serious inroad into his or its ordinary legal rights which must be justified only on the basis of unexceptional public need or interest. Having regard to those consequences, we are inclined to take the view that the charge in the language of section 446, of the present Act is only a drafting change and such a change was not intended to constitute a deliberate departure from the legal consequences flowing from section 171 of the former Act and in this we respectfully agree with the conclusion of the Gujarat High Court in the decision referred to above and we are unable to agree with the view of the Bombay High Court or to affirm the decision of Palaniswamy, J. of this Court.

14. Though we have reached the above conclusion purely on the basis of the statutory provision and the object which it is intended to achieve, we may also mention in passing that the history behind the enactment of the present Act consolidating and amending the law relating to companies and certain other associations in this country does not also support the theory that by the charge of the language in section 446 of the present Act any change in the legal consequences was intended. The Company Law Committee in its Report of 1952 did not recommend any change whatever in section 171 of the former Act and left the position as it was. The Bill that was introduced in the House of the People on 2nd September, 1953, namely, Bill No. 46 of 1953 published in the Gazette of India, Extraordinary, Part II section 2, dated 2nd September, 1953, simply reproduced section 171 of the former Act as Clause 409 of the said Bill.

Even the notes on Clauses merely stated:

> "Clause 409—See section 171 of the existing Act and section 231 of the English Act". (vide p. 839 of the Gazette). The report of the Joint Committee on the Bill as presented in the Lok Sabha on 2nd May, 1955, and published in the Gazette of India, Extraordinary, Part II, section 2 dated 2nd May, 1955, in clause 444 (1) merely provided:

"When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator....... no suit or other legal proceeding shall be proceeded with or commenced against the company, except by leave of the Court and subject to such terms as the Court may impose."

Thus it will be seen that the only change which the Select Committee made was with reference to the appointment of the provisional liquidator and having made the provision in Clause 446 (1) (*a*) that for the purpose of the Act, so far as it relates to the winding up of companies by the Court, there shall be attached to each High Court, an Official Liquidator appointed by the Central Government, who shall be whole-time officer, unless, the Central Government considers that there will not be sufficient work for a whole-time officer in which case a part-time officer may be appointed, this change was made. Except for this change, the position remained as found in section 171 of the former Act. Only during the course of the consideration of the Bill in the Parliament, we find an amendment given notice of by the Government and that amendment was that the expression "shall be commenced or if pending at the date of the winding up order, shall be proceeded with" was substituted for "shall be proceeded with or commenced" and such an amendment was moved and adopted by the Lok Sabha on 7th September, 1955. There was no discussion or comment on this amendment as intending to effect any change in the law. This aspect of the matter also will tend to confirm the conclusion which we have already reached as to the scope of Section 446 of the present Act.

15. Consequently we hold that the application filed by the appellant herein for obtaining leave of the Court for proceeding with the suit which it had already filed, namely, C.S. No. 233 of 1974 was competent and the Court had the power to grant such leave so as to render the suit already filed effective from the date of such granting of leave.

16. In the present case, Ramaprasada Rao, J., has simply followed an earlier decision of Palaniswamy, J., and dismissed the application on the sole ground that obtaining of such leave is a condition precedent for the institution of the suit and that no such leave can be granted after the institution of the suit. It is one thing to hold that such an application is competent and the Court has power to grant leave to render effective a suit already filed and it is another thing to come to a conclusion whether leave should be granted or not in a particular case and if leave is to be granted, on what terms and conditions it should be granted. Since Ramaprasada Rao, J., has held that leave cannot be granted by the Court at this stage, the learned Judge has not considered the merits of the case as to whether leave should be granted or not in this case and if it is to be granted, on what terms. Once we have reached the conclusion that the application filed by the appellant is competent and the Court has got power to grant leave at this stage, we put to the learned counsel for the Official Liquidator as to what the had to say on merits of the case as to the grant of leave. The learned counsel for the Official Liquidator could not raise any valid objection to the grant of leave except to contend that the Official Liquidator's defence in the suit on the merits should not be prejudiced. It is needless to state that the granting of leave as such will not and cannot prejudice the official liquidator's defence on merits in the suit.

17. Therefore, we allow the appeal and set aside the order of Ramaprasada Rao, J., and grant leave to the appellant herein to proceed with the suit. The result of this will be that the suit will be effective only from this date, as held by the Supreme Court in the decision referred to above. There will be no order as to costs.

R.S. ——— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ., A. Varadarajan and V. Sethuraman, JJ.*

Edgar Wesley .. *Plaintiff**

v.

Emity Violet (alias) **Emity Violet Ramani Bai and another** .. *Defendants.*

Dissolution of marriage—Suit for by husband—Earlier decree for judicial separation in favour of wife—Second marriage also contracted by wife—Husband entitled to decree for dissolution—Collusion negatived.

The plaintiff filed a suit in 1976, for dissolution of his marriage with the first defendant on the ground that the first defendant had already secured a decree for judicial separation on 31st August, 1972, in a suit filed by her and had also married the second defendant on 10th December, 1975. The Court below granted a decree for dissolution of marriage subject to confirmation by the High Court.

Held: **On the finding, the plaintiff was entitled to a decree for dissolution of the marriage. Having regard to the facts of this case, there could not be and there could not have been any collusion between the parties since the decree for judicial separation as well as the second marriage of the first defendant with the second defendant were of the wife's own making.** [*Para.* 3.]

Case referred to:—

Christie Mary Stella v. *Dr. Vijay Siddha Raj*, (1979) 1 M.L.J. 57: 92 L.W. 110: (1978) T.L.N.J. 430: A.I.R. 1979 Mad. 100.

Case referred by the District Judge, Coimbatore (West) at Coimbatore in his letter D. No. 6193, dated 16th July, 1976 for confirmation by the High Court under section 17 of the Indian Divorce Act, 1869, of the decree *nisi*, dated 28th June, 1976 and passed in O.S. No. 3 of 1976 on his file.

S. Meenakshisundaram (amicus curiae), for Plaintiff

K. Jayachandran (amicus curiae), for Defendants.

*M.C. No. 12 of 1976. *2nd April*, 1979.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ. — **The plaintiff in O.S. No. 3 of 1976 on the file of the District Judge of Coimbatore (West) sought for dissolution of his marriage with the first defendant on the ground that the first defendant** had already secured a decree for judicial separation on 31st August, 1972 in O.S No. 4 of 1971 on the file of the same Court and though he was willing to live with her, it was the first defendant who obtained such a judicial separation and that he was not therefore interested in setting aside the *ex parte* decree obtained by her. He also alleges that the first defendant **has married the second defendant who had been impleaded as a party to the suit and** that the second marriage took place on 10th February, 1975. On the basis of the above pleadings he sought for a dissolution of the marriage.

2. Both the defendants 1 and 2 were *ex parte* even in the Court below. The learned District Judge marked Exhibits A-1 and A-2 as the exhibits filed on behalf of the plaintiff. Exhibit A-1 is a certified copy of the judgment in O.S. No. 4 of 1971 proving that the first defendant obtained a decree, though *ex parte*, for judicial separation on 31st August, 1972. Exhibit A-2 is the certified copy of the certificate of marriage to establish that the first defendant has married the second defendant. Based on such unrebutted evidence, the Court below granted a decree for dissolution of marriage. But as required in law, the said decree was passed subject to confirmation by this Court.

3. In this Court, Mr. S. Meenakshisundaram was appointed as *amicus curiae* for the petitioner and he has not even filed any appearance in this Court. He is not before us today. However, Mr. K. Jayachandran who also appeared as *amicus curiae* for the second defendant in the action read over the judgment and contended that as there is no express plea of absence of collusion in the pleadings, this Court has to consider whether confirmation of the decree passed by the Court below must be granted in the usual course. As regards the main issue whether the plaintiff is entitled to a decree for dissolution, we have no hesitation in accepting the decree of the Court below that he is so entitled to, for the reason that the first defendant not only sought for a decree for judicial separation as early as 31st August, 1972, but she has also contracted a second marriage on 10th February, 1973 as is seen from Exhibit A-2. These factors irretrie-

vably establish that the first defendant is no longer interested in continuing the marital ties. We accept the finding that the plaintiff is entitled to a decree for dissolution of the marriage on the above facts. The contention, however, is that the plea of collusion does not expressly appear in the pleadings. A Full Bench of our Court in *Christe Mary Stella* v. *Dr. Vijay Siddha Raj and others*[1], observed that though the verb in section 17 is 'shall' which is apparently mandatory, yet all the circumstances have to be taken into consideration to come to the conclusion whether a reasonable inference should be drawn that there was collusion as between the spouses. Having regard to the facts of this case, we find that there cannot be and there could not have been any collusion since the decree for judicial separation as well as the second marriage of the first defendant with the second defendant were her own making. There could not be therefore, any collusion. We are unable to accept the only contention of Mr. Jayachandran appearing for the second defendant as *amicus curiae*.

4. For the above reasons we confirm the judgment of the Court below. We thank Mr. K. Jayachandran for his having acted as *amicus curiae* and for having assisted the Court in this case.

S.J. —— *Lower Court's judgment confirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *P. Venugopal, J.*

S. Jaswant Singh .. *Petitioner**

v.

A.R. Ramanathan .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (*a*) (*i*)—*Landlord's petition for eviction of tenant—Requirement for owner's occupation and non-residential purposes—Diamond and jewellery business carried on by landlord—Rent Controller holding in favour of landlord and ordering eviction Lower Appellate Court holding differently—Revision by landlord—Requirement of landlord for non-residential purposes held* bona fide—*Suitability of premises for non-residential purpose, matter for decision by landlord.*

J purchased a building from *N*. *N* had already let out a portion of that building to *A*. *J* filed an eviction petition against *A* on the grounds that *A* denied his title, *A* committed acts of waste and committed wilful default and that the building was required for the occupation of *J* for both residential and non-residential purposes. The Rent Controller upheld the landlord's petition on the ground of the building being required for *J*'s residential and non-residential purposes. On appeal by the tenant, the lower Appellate Court reversed the order of the Rent Controller. The landlord filed a revision.

Held: The petition-premises might be situated in an industrial area. That by itself was not sufficient for holding that it was not suitable, for the diamond business of the petitioner. After all, where the petitioner should carry on business was a matter of his choice and it was not for the Courts to sit in judgment and indicate the preference. [*Para* 6.]

Cases referred to:

V. Balakrishna Menon v. *M.A. Govindan*, (1979) 1 M.L.J. 237: 92 L.W. 56; *Dakshinamoorthy* v. *Thulaja Bai*, (1952) 1 M.L.J. 390 65 L.W. 942 I.L.R. (1952) Mad. 651: A.I.R. 1925 Mad. 413: (*Miss.*) *S. Sanyal* v. *Gian Chand*; (1968) 2 S.C.J. 218: (1968) 1 S.C.R. 536: A.I.R. 1968 S.C. 438.

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the Subordinate Judge, Devakottai, dated 20th March, 1975 and made in M.A.No. 24 of 1974 (H.R.C. No. 70 of 1971), D.M.C. (Rent Controller), Devakottai.

N.S. Varadachari and *T.V. Ramanujam*, for Petitioner.

S. Sitarama Iyer and *S. Rajarama Iyer*, for Respondent.

The Court delivered the following

JUDGMENT:—The civil revision petition is filed against the judgment, dated 20th March, 1976 of the Subordinate Judge of Devakottai in C.M.A. No. 24 of 1974 reversing the order dated 21st March, 1974 of the Rent Controller, Devakottai, made in H.R.C. No. 70 of 1971.

2. The petitioner is the landlord. The tenant was one A.O.R.M. Arunachalam

1. (1979) 1 M.L.J. 57: 92 L.W. 110: (1978) T.L.N.J. 430: A.I.R. 1979 Mad. 100.

*C.R.P. No. 2707 of 1976. 25th April, 1979.

Chettiar and the respondent before this Court is the L.R. of the said Arunachalam Chettiar. The petitioner purchased the building comprised in R.S. No. 39 from the original owner, Nagammai Achi who had already leased the building on the west to Arunachalam Chettiar for a monthly rent of Rs. 100. The petitioner filed an application for eviction before the Rent Controller contending (*a*) the said Arunachalam Chettiar denied his title and claimed as though the entire R.S. No. 39 was leased out to him; (*b*) the said Arunachalam Chettiar, besides committing acts of waste also committed wilful default; (*c*) the petitioner required the building for his own residential as well as non-residential purposes. On the first two grounds the Rent Controller held against the petitioner. On the third ground. the Rent Controller held that though the requirement of the petitioner for doing diamond and jewellery business in the petition-mentioned premises is not a *bona fide* requirement, yet the requirement of the building for his residence and using the car shed for his car and for housing the machinery and putting up the cutting and polishing units of the diamond business is a *bona fide* requirement and the petitioner is entitled to evict the said Arunachalam Chettiar on this ground. Thiru Arunachalam Chettiar filed an appeal and during the pendency of the appeal he died and it is prosecuted by the legal representative who is now respondent before this Court. The only contention before the appellate Court was whether the requirement of the building by the petitioner for his own use and occupation was a *bona fide* requirement. The appellate Court held:

(1) In considering the question whether the building is required for personal residential occupation of the petitioner and the members of his family, the fact of possession of the house purchased by his wife with whom he admittedly resides is also a relevant factor to be considered, and when there is a house for residential occupation, the claim of the petitioner that the building let out for non-residential purpose is essential for his immediate occupation is not a *bona fide* one.

(2) The nature of the building in question, the locality in which it is situated and the nature of the building in which the petitioner does his business and its location in a central place establish that the building in question can hardly be used for residential purpose and it can be used only for non-residential purpose for which it was leased.

3. The building in question and its surroundings will not be suitable for doing diamond and jewellery business carried on by the petitioner in the rented building in the "heart of the town". The cutting and polishing units are part of the diamond business carried on by the petitioner. When the building is not suitable for the diamond business carried on by the petitioner, the requirement of the building for locating the polishing and cutting units of the diamond business is not a *bona fide* requirement.

In the reply notice sent by the petitioner, there is no mention about the *bona fide* requirement of the building either for residential or non-residential purpose. Viewed against this background, the requirement of the building in question for the personal occupation of the petitioner is not a *bona fide* one. Aggrieved against the order passed by the appellate authority, the petitioner-landlord has filed this revision petition before this Court.

3. It is contended for the petitioner that the landlord is not disentitled from getting an order of eviction for his own residential purpose, merely because his wife has purchased a property and the use of the words "of his own" in section 10 (3) (*a*) (*i*) indicates that it must be exclusively the house of the landlord and the house purchased by the wife cannot be claimed to be the house exclusively of his own, and so the eviction order passed against the tenant should be confirmed. It is further contended that the finding of the Courts below that the building is not suitable for the diamond business carried on by the petitioner is not based on any evidence. The business need not be carried in a premises situated in "the heart of the town" and it can be carried on in any area considered fit by the petitioner and it is for the petitioner to choose the area where the business should be carried on. It is also contended that inasmuch as the Rent Controller has recorded a finding that the building is required for a non-residential purpose and it is a *bona fide* requirement, the order of eviction should be confirmed irrespective of whether the building is required for a residential purpose or not.

4. It is contended for the respondent that having leased out the building for a non residential purpose, it is not open to the petitioner to file a petition for eviction on the ground that he requires the building both for residential and

non-residential purposes. Since the building is not suitable for the diamond business carried on by the petitioner and as the cutting and polishing suits of the diamond business cannot be separated from the main diamond business as they formed one composite unit, the contention that the building is required by the petitioner for a non-residential purpose should be negatived.

5. The facts over which there are no dispute are:—

(1) the petitioner is residing in a rented house and is doing business in diamond and precious stones and jewellery in another rented premises at No. 8, Kannu Pillai Street, Karaikudi;

2. the petitioner is having a rented premises No. 35, Kannu Pillai Street, for the purpose of housing the cutting and polishing units of the diamond business;

(3) the petitioner is having a car and is paying a rent of Rs. 20 for the car shed at door No. 9, Pallivasal Street, Karaikudi;

(4) the petitioner has no other non-residential building, except the petition-mentioned building.

It is thus clear that the petitioner is carrying on the diamond business in a rented building, the polishing and cutting units of the business is housed in another rented building and his car is parked in a rented car shed. The petitioner has purchased the petition-mentioned building so that his business which is scattered and being carried on in a number of small rented buildings, can be carried on in a single building. This clearly demonstrates that the building is required by the petitioner for non-residential purposes *viz.*, for carrying on diamond and jewellery business, and is *bona fide*. The fact that the petitioner is carrying on business in two rented buildings which are situated at two different places and the further fact that the car is parked in a car shed for rent together with the factum of purchase of the petition-mentioned building for a considerable amount of Rs. 15,000 amply go to establish that the requirement of the petitioner for carrying on the business in the petition-mentioned building is a *bona fide* requirement. When the petititioner purchased the building from the original owner Nagammai Achi a portion of the building in the west was already leased to the respondent on a monthly rent of Rs. 100. Then the petitioner was in occupation of only a portion of the building. It is significant to note that the petitioner has not leased out the portion in his possession. This is yet another indication to show that the building was purchased by the petitioner for his own use and occupation.

6. The Rent Controller's finding is that the petition mentioned building is situated in an industrial area and not being situated in the "heart of the town" it is not suitable for carrying on the diamond business of the petitioner The appellate Court has held that since the diamond business and the cutting and polishing unit of the diamond business constitute one composite unit and as the building is not suitable for carrying on the diamond builness, the requirement of the building by the petitioner for non-residential purpose is not a *bona fide* requirement. Except a vague reference in the evidence of P.W. 2 that the petition-mentioned building it situated in an industrial area, there is absolutely no evidence to suggest why the building is not suitable for the diamond business of the petitioner. The finding by the Courts below is that the rented premises where the petitioner is carrying on the diamond business is not situated in the "heart of the town." This is a finding not supported by any evidence. That apart, there is absolutely no evidence to show why the petitioner-mentioned building is not suitable for the diamond business of the petitioner. The petitioner-premises may be situated in an industrial area. That by itself is not sufficient for holding that it is not suitable for the diamond business of the petitioner. After all, where the petitioner should carry on his business is a matter of his choice and it is not for the Courts to sit in judgment and indicate the preference. It is next contended for the respondent that the building is required for the non-residential purpose of the petitioner is not indicated in Exhibit A-4, the reply notice sent by the petitioner and this is a strong circumstance to indicate that the contention that the petitioner is requiring the building for non residential purposes is an after-thought and the requirement of the petitioner is not a *bona fide* one. Exhibit A-4 is a reply to the notice sent by the respondent. The respondent issued a notice containing various allegations and Exhibit A-4 is mainly directed towards denying the various allegations made by the respondent in the notice issued by him Further it is significant to note that even in Exhibit A-4 the petitioner has stated in unmistakable terms that the building is required for the purpose of additional accommo-

dation for carrying on the business of the petitioner. So the contention that the requirement of the building by the petitioner for non-residential purposes is not a *bona fide* requirement and a mere after-thought, is devoid of merits and has to be negatived.

7. It is next contended for the respondent that having leased out the building for a non-residential purpose; it is not open to the petitioner to file a petition for eviction on the ground that he requires the building both for residential and for non-residential purposes. In support of this contention, the decision of this Court in C.R.P. No. 2063 of 1977, dated 31st August 1978 reported in *V. Balakrishnan Menon* v. *M.A. Govindan*[1] was cited. In that case the contention that was advanced before the appellate authority was that the building was let out for residential as well as for non-residential purposes and the landlord cannot obtain possession of the premises for his own residential purpose. The appellate authority rejected the contention following the decision of a Full Bench of this Court reported in *Dakshinamoorthy* v. *Thuluja Bai*[2]. Before the High Court it was contended that the decision of the Full Bench is no longer good law in view of the decision of the Supreme Court reported in *Miss S Sanyal* v. *Gian Chand*[3]. The High Court pointed out that the decision of the Supreme Court was rendered with reference to the provisions of the Delhi and Ajmer Rent Control Act, 1952, which are not in *pari materia* with the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 and the decision of the Full Bench of this Court does not require any reconsideration. It was next contended before the High Court that the Tamil Nadu Buildings (Lease and Rent Control) Act is intended to cover cases where the building is let out exclusively for residential purpose or exclusively for non-residential purpose and the Act is not intended to cover a case where the building has been let out partly for residential and partly for non-residential purpose. That contention was also rejected by the High Court. The decision of this Court cited by the learned counsel for the respondent amply supports the plea that when a building is let out for residential as well as for non-residential purpose, an application by the landlord to obtain possession of the premises for his own residential purpose is clearly maintainable. That apart, the evidence on record clearly establishes that the building let out by the petitioner is required for non-residential purposes *viz.*, to carry on the diamond and jewellery business of the petitioner and to park his vehicle. In view of this finding that the entire building is required by the petitioner for non-residential purpose, the question whether the petitioner having let out the building for a non-residential purpose can seek to obtain possession of the building for both residential and non-residential purposes does not really survive for consideration. In the result, the civil revision petition is allowed. No costs. Time to vacate the premises 6 months.

S.J. —— *Petition allowed.*

1. (1979) 1 M.L.J. 237: 92 L.W. 56.
2. (1952) 1 M.L.J. 30: 65 L.W. 242: I.L.R. (1952) Mad 651: A.I.R. 1952 Mad. 413.
3. (1968) 2 S.C.J. 218: (1968) 1 S.C.R. 536, A.I.R. 1968 S.C. 438

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Shanmughasundaram (unsound mind) by guardian mother Bagya Rathnammal.
.. *Petitioner**

v.

C. Ponnusami Mudaliar, and another
.. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 32, *rule* 15—*Interlocutory application by first defendant for appointment as guardian of third defendant—Allegation of third defendant being of unsound mind—Dismissal of application without judicial enquiry tantamount to failure to exercise juridiction or discharge duty.*

The first defendant in the suit filed an interlocutory application for her appointment as the guardian of the third defendant who was stated to be of unsound mind. The learned Subordinate Judge dismissed the application stating that he had examined the third defendant and found him to be sane. On revision to the High Court by the third defendant,

Held: In the present case no judicial enquiry was conducted and the application for guardianship had been rejected unceremoniously. The lower Court had not exercised its jurisdiction or discharged the duty cast on it under Order 32, rule 15, Civil Procedure Code. The order of the Court below was set aside and

*C.R.P. No. 2153 of 1976. 14th December, 1978.

the matter was remanded to the Court below or fresh disposal in accordance with law. [*Para.* 6].

Cases referred to:—

Ramanathan v. *Somasundaram*, (1941) 1 M.L.J. 234: 53 L.W. 193: A.I.R. 1941 Mad 505; *Balakrishnan* v. *Balachandran*, (1956) 1 M.L.J. 459: (1956) M.W.N. 511; *S.C. Karayalar* v. *V. Karayalar* (1968) 2 M.L.J. 150: 81 L.W. 156: A.I.R. 1968 Mad. 346.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Erode, dated 28th April, 1976 and made in I.A. No. 483 of 1976 in O. S. No. 149 of 1975.

A. S. Venkatachalamoorty, for Petitioner.

K. Sarvabhauman, for Respondents.

The Court made the following

ORDER:—This petition has been filed against an order in I.A. No. 483 of 1976 in O. S. No. 149 of 1975 on the file of the Subordinate Judge, Erode That I. A. came to be filed by the 1st defendant for her appointment as the guardian of the 3rd defendant, who, though a major, was stated to be of unsound mind. There was no counter filed and when the matter came up for final orders the learned Subordinate Judge by his order dated 28th April, 1976 cryptically observed:

> "The 3rd defendant appeared in person on 17th April, 1976. I found him on examination as a man quite sane. Hence, I do not find that the petition is maintainable. Petition is dismissed."

The unsuccessful applicant has now come forward with the present revision.

2. The learned counsel for the petitioner contended that the Court below was wrong in passing the Order in the manner it did. It was also submitted that a regular judicial enquiry as to the lunacy or insanity should have been conducted and conclusion arrived at on that basis.

3. For this purpose, my attention was drawn to three decisions. The first one is *Ramanathan* v. *Somasundaram*,[1] wherein after the final disposal of the suit by the appellate Court, the major defendant's mother put in applications for her appointment as his guardian-*ad-interim* on the ground of the defendant's mental infirmity and inability to manage his affairs and for applying the provisions of the Madras Agriculturists Relief Act to the appellate decree. The applications were remitted to the lower Court which instead of holding a regular judicial inquiry contemplated by rule 15 of Order 32 of the Code of Civil Procedure thought it sufficient to rely on the previous history of the litigation and on its own opinion formed after looking at the defendant and eliciting answers to some questions. The mother was given no opportunity of adducing evidence specially in the shape of doctor's certificate. It was held that it was incumbent on the Court to hold a regular judicial inquiry and desirable to invite the parties to adduce proper evidence even if the parties were somewhat indifferent, especially where **the consequence of the dismissal of the petition would be to prevent the application of the provisions of the Madras Agriculturists' Relief Act. The fact that a person was a man of weak intelligence was held not to be a sufficient ground to hold that he is an insane person or to appoint a guardian *ad litem* and that it depends on the degree of weakness of intelligence.**

4. **Panchapakesa Ayyar, J., in *Balakrishnan* v. *Balachandran*[1] had also to consider a similar question and after referring to Order 32, rule 15, Civil Procedure Code, it was pointed out that:**

> **"The procedure involves a judicial enquiry which consists normally of two parts: (1) questioning the lunatic by the Judge himself in open Court, or in chambers, in order to see whether he is really a lunatic and of unsound mind, and (2) as the Court is generally presided over by a layman, to send the alleged lunatic to a doctor for report about his mental condition after keeping him under observation for some days. That observation need not necessarily mean detaining the man even in hospital. It is enough if the doctor applies the tests at periodical visits to him spread over two or three days, and then gives his conclusions. When this elementary precaution of a judicial enquiry prescribed by law is not observed, I am afraid that the laws of this country will**

1. (1941) 1 M.L.J. 234: 53 L.W. 193: A.I.R. 1941 Mad. 505.

1. (1956) M.W.N. 511: (1956) 1 M.L.J. 459.

not allow a man to be declared a lunatic and a guardian appointed for him on such basis."

It is true that in this decision the caution to be exercised before declaring a person as lunatic and appointing a guardian, is indicated. In other words, the need for circumspection, before passing such an order is emphasised. However, the need for and scope of the enquiry to be conducted are indicated in the decision and that is what is relevant here.

5. In *S.C. Karayalar* v. *V. Karayalar*[1] the duty of a Court to act judicially in the interest of justice in a case of this kind has been reiterated. It was pointed out that the Court has to give a clear finding that the person concerned by reason of his infirmity is incapable of protecting his interest. In this case, also the caution that has to precede the declaration of a person as of insane mind is indicated, but what is necessary to remember is the enunciation of the scope of the provisions of Order 32, rule 15, Civil Procedure Code. As pointed out in *Ramanathan* v. *Somasundaram*[2] the questions and answers if reduced to writing would make it possible for a Court of revision to decide whether the conclusions arrived at on any aspect of the case was justifiable.

6. In the present case, no judicial enquiry was conducted and the application for guardianship has been rejected, if I may say so, unceremoniously. I do not think the learned Subordinate Judge has exercised his jurisdiction or duty that is cast on him under Order 32, rule 15, Civil Procedure Code. The Civil Revision Petition is, therefore, allowed and the order of the Court below is set aside and the matter is remanded to the Court below for fresh disposal in accordance with law. The respondents, if they are so advised, are permitted to file a counter and the matter would be disposed of on the basis of the evidence that may be adduced by the parties. No costs.

S.J. ——— *Petition allowed*

1. (1968) 2 M. L J. 150: 81 L.W. 156: A.I.R. 1968 Mad. 346.

2. (1941) 1 M.L.J. 234: A.I.R. 1941 Mad. 505.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:— *T. Sathiadev, J.*

Mahalakshmi. ... *Petitioner**

v.

P.S Rajeswari *alias* **Santha Bai.** ... *Respondent.*

The Pondicherry (Extension of Laws) Act (XXVI of 1968) section 4 -French Code (Civil) Article 2217-Civil Procedure Code (V of 1908), section 45A—Mortgage deed executed in Pondicherry—Executable decree as per Article 20 of the decrete 1887—Decree can be executed after the coming into force of the Civil Procedure Code.

M executed a mortage deed for Rs. 35,000 in Pondicherry on 27th January, 1965. *M* died in 1969. The lower court allowed the execution of the mortgage deed which itself was a decree under the French Law. Two payments were also received by the mortgagee, the first of which was on 31st March, 1967 a sum of Rs. 3033 and on 3rd April, 1969 a sum of Rs. 5,000. A commandment was also issued on 10th October, 1968 and the mortgage deed became a decree that could be directly executed. The lower Court accordingly ordered the settlement of proclamation for sale of the property. This was objected to by the judgment-debtor's legal representatives who contended that after the passing of the Central Act XXVI of 1968 the concept of a mortgage deed being automatically treated as an executable decree had disappeared and that no commandment could be issued after the applicability of the Civil Procedure Code in Pondicherry. A revision was filed by the legal representative of M as against the order of the lower Court allowing execution of the mortgage deed decree.

Held : On the date when the mortage was created under the French Law then in force, it had already become an executable decree, and this was consequent to what was provided in Article 20 of the *decrete* 1887. Such a "substantive right" having been preservedunder section 4 (2) (a) and (d) as if the Act XXVI of 1968 had not been passed, the petitioner herein could not contend that there was no valid decree in force to be proceeded with in excution under the Civil Procedure Code.

*C.R.P. No. 1811 of 1978. 16th *May*, 1979

The mortgage deed having come into existence before 2nd June, 1968 it had already acquired the character of an executable decree and it would have to be treated as if it was a decree that had been made under the Civil Procedure Code. Being a decree, section 45-A having not substituted any other provisions of the Civil Procedure Code they would be very much available for the enforcement of such a decree. [*Paras.* 16 *and* 19.]

In view of the saving provision found in section 4 (2) of Act XXVI of 1968 in spite of section 45-A (of the Civil Procedure Code) it would be open to such a decree-holder to move the executing Court under the present provisions of the Civil Procedure Code, because what followed such a decree were only procedural aspects, and no one could claim a vested right to a particular procedure, and in this view the respondent can seek the relief, according to the law in force at the time when she sought the execution of the gross copy of notarial mortgage deed executed when the French laws were in force. [*Para.* 20.]

Cases referred to:—

Tulsi Charam v. *Kangali Charan*, (1960) 64 C.W.N. 539; *Krishna Ch. Santra* v. *Tarak Dassi*, (1971) 75 C.W.N. 148; *Susamma Bala* v. *Bibhuti Bhusan*, A.I.R. 1973 Cal. 295; *Adaikappu Chettiar* v. *Ayesha Natchiar*, (1975) 2 M.L.J. 298: 88 L.W. 636: A.I.R. 1976 Mad. 32; *Ghousia Begum* v. *Union Territory, Pondicherry*, A.I.R. 1975 Mad. 345; *Advance Insurance Company* v. *Gurudasmal*, (1970) 2 S.C.J. 488: (1970) M.L.J. (Crl.) 727: A.I.R. 1970 S.C. 1126; *Nandu* v. *Jacinto*, A.I.R. 1970 Goa 143.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the First Additional Subordinate Judge, Pondicherry, dated 19th July, 1978 and made in E.A. No. 694 of 1977 in E.P. No. 200 of 1977.

M. Raghavan, for Petitioner.

P.B. Ramanujam and *J.R.K. Bhavananthan*, for Respondent.

The Court made the following

ORDER.—This revision is filed against an order made in E.A.No. 694 of 1977 in E.P.No. 200 of 1977 on the file of the First Additional Sub-Judge, Pondicherry. The Court below held that the execution taken in respect of the mortgage deed dated 27th January, 1965 executed by Muthukrishnan can be proceeded with even though there has been a change in the law applicable in Pondicherry as on date. E.A.No. 694 of 1977 was filed under setcion 151, Civil Procedure Code, by the judgment-debtor for dismissing the excution petition on the ground that a mortgage deed was executed on 27th January, 1965 by one Muthukrishnan for Rs. 35,000 and the said Muthukrishnan died in 1969, and the legal representatives are now being proceeded against for recovery of the mortgage amount. Under Article 2217 of French Code (Civil), no attachment can be effected without serving a commandment and the requirements prescribed under French Law had not been complied with. Entire debt was incurred for immoral activities and in particular Muthukrishnan was a drunkard and therefore the legal representatives are not liable to pay the debt.

2. This petition was opposed by the decree-holder claiming that, amount was borrowed by Muthukrishnan for lawful purposes and under the French law, as was in force at the time of the mortgage deed, it automatically becomes an executable decree, and in fact, to satisfy the amount due under the mortgage deed decree two payments were received by the mortgagee, the first of which was on 31st March, 1967 a sum of Rs. 3,033 and on 3rd April, 1969 a sum of Rs. 5, 000. There is no proof that the debt was incurred for any immoral purposes. A commandment was issued on 16th October, 1968, and it had been duly served on petitioner herein, and therefore the present proceedings taken to recover the amounts in execution is valid.

3. As stated earlier, the Court below held that a commandment had been already issued on 16th October, 1968 and the mortgage deed under the French Law, as was in force, became a decree that can be directly executed and hence all the objections taken by the petitioner deserved to be rejected, and consequently rejected the petition, and ordered the settlement of proclamation for sale of the property.

4. Mr. Raghavan, counsel for petitioner contends that after the passing of Central Act (XXVI of 1968 The Pondicherry. (Extension of Laws) Act, 1968) (hereinafter to be referred to as the Act), the concept of a mortgage automatically treated as an executable decree had disappeared, and respondents herein can recover the mortgage amount only by filing a civil suit, by obtaining a preliminary decree and thereafter

a final decree, and only then, according to the decree, execution can be taken as against the petitioner. He relies upon section 45-A being introduced in the Civil Procedure Code by virtue of Act XXVI of 1968, to substantiate his contention that when a specific provision has been made as to what could be a decree, respondents cannot any longer rely upon the intendment found in the repealed French Law. As far as commandment issued on 16th October, 1968 is concerned, it is claimed that no such commandment could have been issued after the applicability of the Civil Procedure Code, in Pondicherry and what is relied upon is not a valid commandment at all. No doubt in the memorandum of grounds, it has been stated that the mortgagee having taken proceedings under the French Law, cannot seek relief under the Indian Law. But the main contention taken in the civil revision petition is whether mortgage dated 27th January, 1965, can be treated as a decree under the French Law, which can straightaway be executed under the Civil Procedure Code, which has been made applicable after the passing of "the Act".

5. Mr. Bhavananthan, counsel for respondents contends that under section 4 of Act XXVI of 1968, in spite of repealing of earlier enactments made under French Law, section 4 (2) saves the rights and privileges acquired under the repealed laws including remedies provided therein and therefore even after the Civil Procedure Code was made applicable in Pondicherry, the substantial right already acquired under the mortgage deeds, which in law are to be treated as decrees, cannot be taken away, that section 45-A in Civil Procedure Code, has not substituted or replaced the other provisions which would continue to be applicable and that therefore execution can be taken straightaway under the Civil Procedure Code, treating the mortgage debt dated 27th January, 1965 as a decree. Even if there are any infirmities regarding the issue of commandment, since the French Code (Civil) had been repealed, execution can be straightaway taken by invoking provisions of the Civil Procedure Code.

6. Counsel appearing on both the sides have referred to the following decisions which will have bearing on the point involved in this revision petition. First of the decisions relied upon is *Tulsi Charan* v. *Kangali Charan*[1] wherein the question arose as to whether grosses copies of notarial mortgage bonds in executory forms are executable as decrees under Civil Procedure Code, and whether execution can be proceeded with straightaway on the presumption that there has been an enforceable and executable decree. When a similar situation arose after the integration of Chandranagore, initially *de facto* and later on *de jure* with the State of West Bengal, and to which area provisions of Civil Procedure Code, were made applicable, it was held, uuder French Law a grosses copy of a notarial mortgage deed is a decree; and this right having been preserved it can be put into execution under Civil Procedure Code. It was contended in that the grosses copy of a notarial mortgage bond (hereinafter to be referred to as the 'mortgage bond') is not a decree within the meaning of the provisions of Civil Procedure Code, and the only recourse to a mortgage is to file a suit in enforce the mortgagee, obtain a preliminary decree and a final decree and only thereafter proceed to sell the mortgaged property in case a decree is secured. Similar extension orders and merger Acts were made in respect of Chandranagore and the rights acquired under French Law were preserved in certain respects. It was not disputed that a mortgage bond of the nature contemplated under French Law, was in law considered as a decree of a competent Court. There was no requirement of filing a suit on the mortgage bond, obtain a decree in a civil Court functioning under French Laws and thereafter go in for execution. The Division Bench referred to earlier judgments of the Calcutta High Court and held that a grosses copy of a notarial mortgage deed should be executed as a decree. It was also held therein that the French Laws of Chandranagore were replaced by the laws in force in the rest of India after 2nd May, 1950, and the procedure by which a notary working under the decree of 1887 could grant a grosses copy in executory form ceased to be effective, but it would not mean that Order 34, Civil Procedure Code, cannot be invoked on the basis that it is not a decree. It was also held in the said decision that in relation to the Civil Procedure Code, the corresponding law would mean, not merely the French Civil Procedure Code, but the decree of 1887, in so far as it had authorised that mortgage bond in executory form can be proceeded with in execution. Therefore it was held therein that in spite of the Civil

1. (1960) 64 C.W.N. 539.

Procedure Code, having been made applicable to Chandranagore after 2nd May, 1950, the mortgage bonds of earlier origin "had the force of a decree and that right was not taken away by the enactments by which the French Laws were gradually replaced by the Indian laws in Chandranagore. Therefore we agree with the findings of the Court below that the grosses copy of the notarial mortgage bond in favour of the creditor can be put into execution by him without the creditor having to file in the first instance, a mortgage suit."

7. The next decision is *Krishna Ch. Santra* v. *Tarak Dassi*,[1] wherein also a division bench held that even after the merger of French territories of Chandranagore with the Union of India, the position is that the decrees remained valid decrees, as if they were passed by Indian Courts, and the rights and remedies of the holders of notarial deeds were not lost. This was a case where the suit was based not on the original consideration, but for recovery of decretal dues with interest, on the basis of assignment deeds, but they also bore the character of notarial deeds. In this decision reference was made to Articles 146 and 545 of French Civil Procedure Code relating to execution of grosses copies of notarial deeds and to what extent they can be treated as decrees under the French Law. It has been held therein as follows:—

> "The uniform opinion of this Court is as revealed in these decisions that even after the Code of Civil Procedure of India came into operation in Chandranagore, the right and remedy of the holder of notarial deeds were not lost, with the consequence that the grosses copies of the notarial deeds could be enforced by execution under the corresponding provision of the Indian Code of execution of the grosses copies having the force of a decree."

8. A full bench of Calcutta High Court in *Susama Bala* v. *Bibhuti Bhusan*[2] while dealing with this problem, held that grosses copy can be executed under the Indian Law without filing a suit, and such a right, being a substantive right, and not a procedural one, has been preserved under Indian Law, and it is not inconsistent with the provisions of Civil Procedure Code. Reference was made to Article 545 of French Civil Procedure Code which required a notary under the French law to deliver a grosses copy of a mortgage bond, and once filed, it assumes an executory character as a decree' in accordance with the French Laws. It was held:

> "the right to execute is in our opinion a substantive right like the right of appeal. This right had or has nothing to do with the procedure for execution. The right is the right to have the mortgaged property sold without filing a suit. The said right certainly is not the same as the method or manner or process to be followed in our opinion to execute the said bond."

The Code of Civil Procedure does not contain any provision whereby a similar substantive right *i.e.*, to have such an instrument executed without the necessity of filing a suit has been conferred."................................" Article 20 of the decree of 1887 mentioned above reads as follows:—

> "They (Notarial Deeds) are executory in the whole extent in the territory of the Republic etc."

The same was or is not inconsistent with the provisions contained in the Code of Civil Procedure and thus was in force on or before the 'appointed day' mentioned in the Regulation of 1952. Such right was continued by Regulation 8 of the Chandranagore (Administration) Regulation of 1952, mentioned above. The said Regulation is set out hereunder:—

> "Save as otherwise expressly provided in this Regulation all laws in force in the free town of Chandranagore immediately before the appointed day shall continue to be in force until repealed or amended by a competent Legislature or authority."

Later on Chandranagore (Merger) Act, 1954 was passed and section 18 which dealt with repealing is more or less identical to the provisions of section 4 (2) of Act XXVI of 1968. In view of the safeguards provided under the Merger Act of 1954, it was held by the Full Bench that neither the order of 1950 nor the Regulation of 1952. as we have noted earlier, did affect any right including such right of a mortgagee, or any privilege, obligation or liability acquired, accrued or incurred prior to 2nd May, 1970, and in this view, it was finally held that the procedure in execution being a part of the adjective law, must be governed by the procedural law prevalent at the time of

1. (1971) 75 Cal. W.N. 148.
2. A.I.R. 1973 Cal. 295.

execution, that is to say, the Civil Procedure Code of 1908, since there is no vested right in procedure and a grosses copy of a notarial mortgage deed being a decree which is a 'substantive right', has been preserved and it is the nature of 'a decree' of a competent Court of law and has the force of such a decree under the French Law and also under Indian Law.

9. Reference was made to the decision rendered in *Adaikappu Chetliar* v. *Ayesha Natchiar*[1] which dealt with a notarial mortgage deed and on the question as to whether it could be treated as a decree and the learned Judge observed "upon this question, In do not wish to pronounce any opinion". The Full Bench decision of the Calcutta High Court was referred to therein. But ultimately the learned Judge held that even though such a privilege was available to a party, when he files a suit in the ordinary civil Court, on the foot of a notarial mortgage deed, it will be the plain duty of the Court to entertain the suit under section 9 of the Civil Procedure Code. It was a case wherein the suit filed on the basis of the mortgage deed was resisted on the ground that such a suit is not maintainable and therefore the decree is not a valid one. No doubt reference to section 4 of Act XXVI of 1968 had been made. But yet it was held that the relief being an alternative one, a suit can be filed on the mortgage deed.

10. Reliance was placed on the judgment of the Division Bench of this Court in *Ghousia Begum* v. *Union Territory, Pondicherry*[2], wherein the scope of section 4 (1) of Act XXVI of 1968 came up for consideration and relying upon the decision of the Supreme Court in *Advance Insurance Company* v. *Gurudasmal*[3], it was held that the provisions of Act XXVI of 1968, as far as possible, must be read with a view to their validity and not to render them invalid.

11. It was a case wherein the question arose whether there should have been a notice under section 80, Civil Procedure Code, before institution of the suit. The suit was instituted, after the Civil Procedure Code, was made applicable without such a notice and it was contended that having regard to clause (*d*) of sub-section (2) of section 4 of Act XXVI of 1968, such pre-requisite need not be complied with. The Division Bench held that the issue of a notice being a procedural matter, after the Civil Procedure Code, was made applicable with effect from 24th May, 1968, section 4 (2) cannot be invoked by the appellant therein. (Though in the said judgment it has been repeatedly stated that the Code of Civil Procedure, as in force in the State of Madras on 1st August, 1966 has been made applicable to the Union Territory of Pondicherry with effect from 24th May, 1968, the correct date is 5th September, 1968). The decision rendered in *Nandu* v. *Jacinto*.[1] was referred to, for the limited purpose of showing that unless and until repealed that law comes into force, what every had been the law applicable to the territor which had been merged, and will continue to be enforceable.

12. Before considering the purport of these decisions, it will be necessary to extract section 4 of Act XXVI of 1968 and the column dealing with Civil Procedure Code in Part II of the schedule to the Act which refers to section 45-A being inserted.

> 4. *Repeal and saving*:—(1) Any law in force in Pondicherry or any area thereof corresponding to any Act referred to in sub-section (1) of section 3 or any part thereof (except in so far as such law continues to be applicable to Renoncants) shall stand repealed as from the coming into force of such Act in Pondicherry.
>
> (2) Nothing in sub-section (1) shall affect—(*a*) the previous operation of any law so repeated or anything duly done or suffered thereunder; or
>
> (*b*) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed, or
>
> (*c*) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed;
>
> (*d*) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any

1. (1975) 2 M.L.J. 298: 88 L.W. 636: A.I.R. 1976 Mad. 32.

2. A.I.R. 1975 Mad. 345.

3. (1970) 2 S.C.J. 480: (1970) M.L.J. (Crl.) 727: A.I.R. 1970 S.C. 1126.

1. A.I.R. 1970 Goa. 143.

such penalty forfeiture or punishment may be imposed as if this Act had not been passed:

"Provided that anything done or any action taken (including any appointment or delegation made, notification, instruction or direction issued, form, bye-law or scheme framed, certificate obtained, permit or licence granted, or registration effected under any such law, shall be deemed to have been done or taken under the corresponding provision of the Act extended to Pondicherry by this Act and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the said Act.'

Part II Schedule:—

1908	The Code of Civil Procedure, 1908
(1)	(2)

As in force in the State of Madras on the 1st day of August, 1966.

(3)

After section 45, insert:

(4)

"45-A. *Execution of decrees, etc., passed or made before the commencement of the Code in Pondicherry*:—Any judgment, decree or order passed or made before the commencement of this Code by any civil Court in the Union Territory of Pondicherry shall, for the purpose of execution, be deemed to have been passed or made under this Code:

Provided that nothing contained in this section shall be construed as extending the period of limitation to which any proceeding in respect of such judgment, decree or order may be subject."

13. Mr. Raghavan, counsel for petitioner, contends that the decisions of the Calcutta High Court can have no applicability because of the insertion of section 45-A to Civil Procedure Code. When specific provision has been made as to what are the decrees that can be executed under Civil Procedure Code, it has to be construed that any other form of a decree cannot be executed under the Civil Procedure Code. Section 45-A is in respect of decrees passed and made before the commencement of the Code in Pondicherry and it refers to such decrees made by any civil Court in the Union Territory of Pondicherry being deemed as a decree made under the Code.

14. Section 2 (2) of Civil Procedure Code, defines a decree as a formal expression of an adjudication by civil Court which conclusively determines the rights of parties. Hence he contends that a mortgage bond is not a decree which has conclusively determined the rights of parties; nor does it adjudicate the controversies between the parties and hence it is not a decree which can be enforced after 5th September, 1968 under Civil Procedure Code. In this case. mortgage was executed on 27th January, 1965 and Act XXVI of 1968 came into force on 24th May, 1968. Civil Procedure Code was made applicable by notification with effect from 5th September, 1968 and Transfer of Property Act became applicable on and from 9th January, 1969. If respondent is able to show that she had acquired any right, privilege etc., under any law so repealed under section 4 of the Act or that any remedy in respect of such right or privilege was available, then by virtue of section 4 (2) she could rely upon rights as having been preserved in their favour. Section 4 (2) states that nothing in sub-section (1) shall affect such rights and privileges and they shall be continued to be in force as if Act XXVI of 1968 had not been passed. When savings provisions have been so conceived of in an enactment to preserve vested and substantial rights, it cannot be lightly brushed aside merely because new laws have been made after repealing the existing enactments. If it had been done, without any qualification or reservation, it can then be contended that the rights under the defunct laws cannot be relied upon for being pursued with under the new laws. It is not necessary for me to dwell at length to find out whether a notarial deed issued under the French law results in a procedural right or a substantive right, in view of the decisions above referred to, and in particular when a Full Bench of the Calcutta High Court has held that such a right is a "substantive right".

15. The decision in *Adaikappa Chettiar's case*[1] (above referred to) does not decide this aspect one way or other, but simply holds that the plaintiff can share with the other Indian citizens the right to file the suit on the mortgage deed without enforcing it as if it were a decree under the French law.

16. The mortgage deed was created on 27th January, 1965 and the Civil Procedure Code

1. (1975) 2 M.L.J. 298: 88 L.W. 636: A.I.R. 1976 Mad. 32.

was made applicable to the Pondicherry Union Territory only on 5th September, 1968. The said mortgage was in a notarial form and this is not in dispute. Act XXVI of 1968 was published only on 24th May, 1968. Therefore on the date when the mortgage was created, under the French law then in force, it had already become an executable decree, and this was consequent to what was provided in Article 20 of the decrete 1887. The mere fact that Civil Procedure Code had replaced French Civil Procedure would not mean that the rights and privileges already acquired and continued to be in force as on 24th May, 1968 had been totally lost. The right acquired by respondents being a "substantive right" and not a procedural right, cannot be replaced by the Civil Procedure Code. Such a "substantive right" having been preserved under section 4 (2) (*a*) and (*d*) as if "the Act" had not been passed, the petitioner herein cannot contend that there is no valid decree in force to be pursued with in execution under Civil Procedure Code. Even the Division Bench of this Court in *Ghousia Begum's case*[1] only dealt with a "procedural" matter and not about a substantive right or vested right. It is only in that view, the Division Bench held that when the procedural law had been replaced by the Civil Procedure Code, and when there can be no vested right in procedure, the parties are bound to abide by the available procedure on the date when rights are sought to be enforced. Therefore the mortgage deed having come into existence before 2nd June, 1968 it has already acquired the character of an executable decree, and it will have to be treated as if it is a decree that has been made under Civil Procedure Code.

17. On the aspect as to whether it can be equated to a decree under Civil Procedure Code, Mr. Raghavan, refers to the definition of 'decree' under section 2 (2), Civil Procedure Code, and also to section 45-A which has been inserted by Act XXVI of 1968. He would state that when Indian laws were extended to the area of Chandranagore, no corresponding provision to section 45-A was incorporated, and even on the definition of 'decree' in Civil Procedure Code, the mortgage bond cannot be a decree and therefore the execution Court can never entertain it.

18. Section 45-A has been inserted as part of the other provisions of Civil Procedure Code and it has not resulted in modification or deletion of any existing provisions. The plea that when a special provision has been made in respect of decrees in Pondicherry, passed or made before the commencement of the Code, would mean that other provisions in the Civil Procedure Code will not be applicable and hence, no provision having been made for the deemed decrees of notarial deeds, the respondent herein cannot maintain the execution petition, cannot be accepted for the following reasons.

19. Section 45-A is an additional provision and it does not stand in the way of the other provisions relating to decrees in the Civil Procedure Code being invoked. The decisions rendered by the Calcutta High Court about the executable nature of mortgage bonds are to the effect that they being decrees, they will come within the scope of decree as defined in the Civil Procedure Code and the further proceedings to be taken being of procedural nature, such decrees can be executed by invoking the Civil Procedure Code. A Full Bench of five Judges of the Calcutta High Court had held that a grosses copy of a notarial mortgage bond is in the nature of a decree of a competent Court of law and has the force of such decree under the French law and also under the Indian Law. Bereft of a smilar provision having been made for Chandranagore as is made under section 45-A for Pondicherry, it has been held that such a mortgage bond will be a decree, under section 2 (2) of the Civil Procedure Code, and can be executed straightaway. Thus, whether section 45-A in any manner alters this situation, is the question that remains to be considered. It refers to decrees passed or made by any civil Court in Pondicherry and it does not deal with grosses copies of notarial mortgage deeds, which are decrees. Section 4 (2) (*a*) and (*d*) of Act XXVI of 1968 has saved the "substantive right" acquired under the French law, to the effect that a mortgage bond becomes an executable decree, and such a right can be enforced as if the said Act had not been passed. Being a decree, section 45-A having not substitued any other provisions of the Civil Procedure Code they would be very much available for the enforcement of such a decree. Merely because section 45-A deals with decrees passed by civil Courts in Pondicherry, it cannot be contended that a notarial mortgage decree being outside section 45-A it is not valid after the Civil Procedure Code was introduced on 5th September, 1968. When Act XXVI of 1968 was made, if only an explanation had been added to deal with the cases of notarial deed decrees to be

1. A.I.R. 1975 Mad. 345.

deemed as decrees, it could have solved the difficulties experienced by persons who have acquired "substantive rights" under the law which was in force before 24th May, 1968, and which was preserved under section 4 (2) of the Act.

20. The contention of Mr. Raghavan that since a special provision has been made, it excludes the applicability of the other provisions relating to decrees under Civil Procedure Code, cannot be accepted because section 45-A is confined only to a particular category of decrees being decrees passed or made by any civil Court in Pondicherry. In view of the saving provision found in section 4 (2) of the Act, in spite of section 45-A it will be open to such a decree-holder to move the executing Court under the present provisions of the Civil Procedure Code, because what follows such a decree are only procedural aspects, and no one can claim a vested right to a particular procedure, and in this view, the respondent can seek the relief, according to the law in force at the time when she seeks the execution of the grosses copy of notarial mortgage deed executed when French Laws were in force.

21. On the aspect of irregularity or otherwise of the commandment, it does not arise for consideration and whatever had been done will be irrelevant, because the commandment made on 16th October, 1968 was well after the enforcement of Civil Procedure Code which came into force on 5th September, 1968 itself. The issue of commandment and other steps being procedural aspects, they cannot any longer be valid and execution will have to be proceeded only according to the provisions of Civil Procedure Code. Hence the aspect of liability to pay interest only for five years, has to be considered and the amount to be recovered requires fixation. Though on different grounds, the Court below came to the conclusion that the grosses copy of mortgage bond can be executed straight-away as a decree, in view of the reasons above stated, it is well open to the respondent to proceed with the execution by invoking the provisions of the Civil Procedure Code. Therefore this civil revision petition is dismissed. No costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Ibrahim Fathima .. *Appellant 2nd defendant**

v.

Mohammed Saleem (minor) and others ... *Respondents (Plaintiffs 1 to 4 and 1st defendant)*

Mohammedan Law—Maintenance—Obligation of father to maintain children whether personal or attached to his property—'M' having two wives—First wife childless and second wife having four minor children—'M' falling out with second wife—Petition by second wife against husband for maintenance of herself and her minor children—Consent order passed—Amount of maintenance not paid—Petition by husband for amendment of order alleging that he had divorced his second wife—During pendency of his petition, husband settling properties in favour of first wife excluding second wife and her children—Suit by second wife as next friend of the minors against husband for future maintenance—Charge decree for maintenance if can be granted on the properties given over to the first wife under the settlement—Transfer of Property Act, 1882, section 39—Right to maintenance—Enforceability on another person's property—Rules of Mohamedan Law cannot be affected by the provisions of the Transfer of Property Act.

The obligation of the Mohamedan father to maintain his minor children may be described as a personal obligation, and may be correctly so described. But that does not mean that the context of that obligation falls within the literal meaning of the expression "personal". Saying that an obligation is personal does not mean that the only sanction which the law imposes for the performance of the obligation is to proceed against the obligee's person whenever he fails to discharge that obligation. In the context of the relationship between a father and his minor children, all that the idea of personal obligation imports is that he is under a duty to maintain them even on the mere aspect of his being their parent. [*Para.* 15.]

The text books on Mohamedan Law might for aught, be variations of the same theme. But both show tha e Prophet as the supreme law-giver had to on the subject of main-

*S.A. No. 251 of 1977. *3rd August, 1978.*

tenance of wifes and children and the liability of the husband's or father's property, as the case may be, to such maintenance. Reducing the Prophet's words in modern legal terminology it can be said that a Muslim father's obligation to maintain his children attaches to his property and runs with it. [*Para.* 22.]

In the absence of any leading authority, the Courts in this land must administer the personal law for Muslims on this difficult question only on the basis of the ancient textual authorities, whose validity as sources of law can hardly be questioned. Having regard to the tradition handed down from the Prophet himself there seems to be every judicial complusion to follow the injunction which the Prophet administered to his followers as the only rule of law bearing on the subject of maintenance. [*Para.* 24.]

Section 39 of the Transfer of Property Act, lays down, *inter alia,* a person's right to maintenance on a change of the properties of another person, where the transfer was gratuitous. The effect of that saving provision is that rules of Mohamedan Law cannot be affected or overridden by section 39 or any other provision in Chapter II of the Transfer of Property Act. [*Paras.* 26, 27.]

Held, that under the Mohamedan Law, minor children are entitled to have a decree for their maintenance made a proper charge on the property of the father. Children's right to maintenance in a Muslim household always attaches to the father's property in such a way and in such a measure that it is not affected by any subsequent alienation by the father with notice of the charge or by an alienation which is gratuitous. [*Para.* 28.]

Cases referred to:—

Manikyam v. *Venkayamma*, 1956 An.W.R. 1021: A.I.R. 1957 A.P. 710; *Mahomed Jusab* v. *Haji Adam,* (1911) I.L.R. 37 Bom. 71; *Aga Mahomed Jaffar Bindaneen* v. *Koulson Bee Bee,* (1897) 24 I.A. 196: I.L.R. 25 Cal. 9: 7 M.L.J. 115; *Baker Ali Khan* v. *Anjuman Ara Begam,* (1903) 30 I.A. 94: I.L.R. 25 All. 236.

Appeal against the decree of the Court of the Subordinate Judge, Tiruchirapalli in Appeal Suit No. 106 of 1976, preferred against the decree of the Court of the District Munsif of Tiruchirapalli in Original Suit No. 407 of 1974.

A. Abdul Hadi and *Syed Ali,* for Appellant.

Hajee P.K.Jamal Mohammad and *S. Sahul Hameed* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal raises a difficult problem in Mohamedan Law relating to maintenance of children by a father. The question is whether the father's obligation is purely personal or whether it attaches to his property in such a way as to be forced even against an alienee from the father. To find a solution to this problem learned counsel had to hunt for material in ancient texts of Islamic Jurisprudence. For, there was a surprising dearth of case-law on the subject. And, as I shall presently show, the one solitary case on the subject figuring in our law reports contained little or no reference to ancient sources.

2. The question in this case arose this way. One Mohammed Ali had three properties and two wives. Under a settlement of the year 1972 he settled all the three properties on his first wife, Ibrahim Fathima, to the entire exclusion of the second wife, Ummul Bashira, and her four minor children. The document value of the settled properties was Rs. 55,000.

3. The circumstances under which Mohammed Ali parted with his properties under the settlement are not very much in dispute. He had fallen out with his second wife, for some reason, and switched his affections back to his first wife. The neglected second wife then filed a petition before the Magistrate for maintenance of herself and her children. An order by consent was passed in that petition for payment of a monthly maintenance of Rs. 40 to the second wife and Rs. 10 to each of the minor children. Mohammed Ali did not pay the amounts, but filed on amendment petition before the Magistrate saying that he had divorced his second wife, in the meantime, and the earlier maintenance order should be limited to the period of the iddat or up to 1975. It was during the pendency of these proceedings that he effected the settlement in favour of the other wife.

4. In the events that happened, the second wife took steps to protect the interests of her

nine children. As their next friend, she sued her husband for payment of future maintenance to the children. In the suit she asked for a charge decree for maintenance, on a charge of the three properties which her husband had earlier given over to the first wife under the settlement. Apparently for this reason, the first wife was also made a defendant in the suit.

5. In the suit, the plea put forward by Ummul Bashira on behalf of the minor children was that the settlement effected by their father in favour of their step-mother was sham and nominal. It was also pleaded that the transaction was put through with intent to defeat the rights of the minor children to have recourse to the properties in question, for working out their maintenance.

6. The suit was resisted by both Mohammed Ali, the father, and Ibrahim Fathima, the step-mother. Their contention was that the properties had always belonged to Fathima and the settlement only regularised the position. In any event, it was further contended that the settlement was valid. Lastly, it was urged that the children could not question the settlement on a mere claim for maintenance against the father.

7. The learned District Munsif, Tiruchirapalli, who tried the suit, passed a decree directing the father, Mohammed Ali, to pay maintenance at the rate of Rs. 40 each to the two elder minor children and Rs. 30 to each to the two younger ones. The maintenance so decreed was also made a charge on the properties which the second wife, Ibrahim Fathima, had taken under the settlement.

8. In passing the decree in the manner aforesaid, the District Munsif recorded the finding that Mohammed Ali had effected the settlement of all his properties in his first wife's favour with a view to defeat his second wife's children from enforcing their right to maintenance from those properties. Proceeding, he held that notwithstanding the settlement the minor children were entitled to a charge over the settled properties, relying on section 39 of the Transfer of Property Act, 1882.

9. On appeal, the Sub Court confirmed the quantum of maintenance decreed by the trial Court, subject to a slight variation in the period of payment. As to the legal effect of the earlier settlement of the properties, the learned Subordinate Judge agreed with the trial Court in holding that it was effected to defeat the minor's recourse to these properties. The learned Judge took the view that in any case the settlement will not affect the minor children's charge on those properties for payment of the maintenance. In effect, the learnod Sub Judge confirmed the charge decree passed by the trial Court.

10. In this second appeal filed by Ibrahim Fathima, wife of Mohammed Ali and step-mother of his minor children, her learned counsel, Mr. Abdul Hadi did not and could not raise any contest over the decree for maintenance as such. His objection was to that part of the decree which made the payment of maintenance a charge over the settled properties.

11 Mr. Hadi sought to assail the findings of the Courts below on the subject of the settlement deed of 1973, He was not so much against the findings themselves, but against the wisdom of rendering findings at cross purposes, as it were. But, the Courts, he said, had found: (i) that the settlement was sham and nominal; and (ii) that it was effected with intent to defeat the minor children's right to maintenance. He said that the two findings cannot co-exist. A settlement can defeat other's rights in the property settled only if it was real, and not if it was not genuine, he said. The two findings, according to him, were self-contradictory.

12. Logically speaking, Mr. Hadi may be right in his criticism of the two findings. But they cannot be rejected out of hand for that reason, because, as factual findings, they are amply supported by the evidence on record; and such, in its own way, supports the Court's ultimate determination in the case.

13 Mr. Hadi then put forward his major submission that maintenance payable by a Muslim father to his children, for which he may be rendered liable by a Court decree, can never be made a charge on his properties. This contention would bear examination, in any case, even on the footing that the settlement effected by Mohammed Ali was a genuine and valid settlement in favour of his first wife.

14 Mr. Hadi's thesis was that Mohamedan Law does not recognise the minor children's maintenance as a charge on the father's property. I was taken aback by this asserties. For I had always thought the general

principle to be quite otherwise and I imagined Mohamedan Law to be no exception. It also seemed quite reasonable and civilised to expect all systems of law to link children's maintenance with property as its security. Mr. Hadi, however said that Mohamedan Law was different, and to a Muslim father the obligation to maintain his minor children was purely personal. He laid emphasis on the word *personal*. If it was a personal obligation, pure and simple. then, he said, that offers no scope for any charge being laid on the father's property to any extent.

15. I do not except this semantic argument of Mr. Hadi. The obligation may be described as a personal obligation, and may be correctly so described. But that does not mean that the context of that obligation falls within the literal meaning of the expression, 'personal'. Saying that an obligation is personal does not mean that the only sanction which the law imposes for the performance of the obligation is to proceed against the obligee's person whenever he fails to discharge that obligation. In the context of the relationship between a father and his minor children, all that the idea of personal obligation imports is that he is under a duty to maintain them even on the mere aspect of his being their parent. This idea is brought out forcefully in the following passage from a judgment of Viswanatha Sastri, J., in *Manikyam* v. *Venkayamma*[1]:

> "It is true that the husband or father is under a personal obligation to maintain his wife or infant children. This does not mean that the obligation could be enforced only by sending him to jail in case of default and that the wife or infant children have no right to be maintained out of the property of the husband or the father as the case may be. The rule as to personal obligation only emphasises the legal and imperative duty of the husband to maintain his wife and minor children irrespective of the possession of any property.".

Although these observations were rendered in the context of a Hindu wife's right of maintenance against her husband or of a Hindu infant against his father, I adopt those observations, with respect, as bearing a general character, deriving therefrom a proper conception about the nature and content of the right to maintenance of Mohamedan children as against the property of their father.

1. 1956 An. W.R. 1021 : A.I.R. 1957 A.P. 710.

16. Mr. Hadi referred me to a decision of alearned single Judge of the Bombay High Court reported in *Mohamed Jusab* v. *Haji Adam*[1]. In that case, a Mohamedan minor child under the age of seven years sued his father for maintenance decree on a charge of the father's share in certain properties. Holding that the minor child was not entitled to a charge on the father's property the learned Judge observed:

> "It has only to be added that no authority has been quoted for charging the maintenance on the father's property and there would appear to be none under Mohamedan faw.".

17. Mr. Hadi placed great reliance on this case. He said that this was the only reported authority, on the subject and I should follow it is deciding the present case.

18. Mr. Hajee P.K. Jamal Mohamed, appearing for the minor children agreed with Mr. Hadi that the Bombay decision was the only one the subject figuring in our law reports to date. But he regretted that this solitary decision should have been rendered *per incurium*, without any reference to the original sources of Mohamedan Law. He cited some text books to show that this ruling does not prevent the Courts from exercising their discretion in appropriate cases and charging the father's property for the maintenance of his minor children. Citing Mohamedan Law by Babu Ram Verms (Second edition) 195 and Muslim law by Mushin Tayyabji (Fourth edition) 276, Mr. Jamal Mohamed submitted that Muslim lawyers in this country had never understood the law in the categorical and inexerable terms in which it was laid down in the Bombay decision when it said that in no case was a Muslim minor child entitled to a charge on the properties of the father for payment of maintenance.

19. Mr. Hadi attempted to supply some plausible juristic basis for his proposition that children's maintenance had nothing whatever to do with the father's property. He said that under Mohamedan Jurisprudence, a father is enjoined to maintain his children irrespective of whether he has any property or none. Quoting Baille I-456, Hedaya 340, he said that the father's obligation to his children in this regard is not affected even by his indigence, so long as he has some ability

1. (1911) I.L.R. 37 Bom. 71.

left to somehow care. This principle, according to learned counsel, has the effect of dissociating the idea of maintenance from the existence of property interests in the father.

20. If the true view of maintenance was that it is an obligation in itself even in the absence of property, it followed, according to Mr. Hadi, that the mere accident of possession of property by a father in a given case cannot make it a necessary attribute of the obligation itself.

21. Mr. Jamal Mohamed said that for this doctrine of maintenance rights profounded by Mr. Hadi, there was no support in ancient writings. What they laid down, he said, was the exact opposite. He referred to two texts based on the words of the prophet himself. According to the tradition, the prophet once said to Hind, the wife of Abu Sufian, 'Take from his property what is required for thy needs, and the needs of thy child'. This tradition is reported by Bukhari and Muslim, and has been explained at length in *Fathu'l Qadir.* Vide Muslim Law by Mushin Tayyabji (Fourth Edition) 266. Ameer Ali in Mohamedan Law (Fifth Edition, Vol. II) at page 406 quotes *Hedaya* as found in *Sahib-ul-Bukhari* to refer to another ancient illustration. The tradition is that on one occasion Hind, daughter of Otta, came and complained to the Prophet that her husband Abu Sofin was a minor, and did not support her and her child properly. The Prophet is stated to have replied: 'Take what is necessary, but be moderate'.

22. Both the texts, above quoted, might, for aught we know, be variations of the same theme. But both show what the Prophet as the supreme law-giver had to say on the subject of maintenance of wives and children and the liability of the husband's or father's property, as the case may be, to such maintenance. Reducing the Prophet's words in modern legal terminology Mr. Jamal Mohamed said that a Muslim father's obligation to maintain his children attaches to his property and runs with it. I think I must agree with this interpretation of the law according to the prophet.

23. Mr. Hadi, however, cautioned me as a Court sitting in twentieth century India from reading ancient Arabic texts too astutely and two liberally for mouthing new-fangled legal principles. He cited the observations of the Privy Council in *Aga Mohamed Jaffar Bindaneen* v. *Koolson Bee Bee*[1]; *Baker Ali Khan* v. *Anjuman Ara Begam*[2] and said that Courts of law should not attempt to put their own construction on the Quran nor give any effect to new rules of law, however logically they may be deducible from ancient texts, when they have not been dealt with earlier by authoritative commentators.

24. I bow to the caution administered by the Privy Council and by Mr. Hadi as a salutary one. But then I should not take liberties with, or put a gloss of my own on the law laid down by ancient Muslim sources, I cannot at the same time, ignore the plain dictates of tradition as reported by acknowledged authorities or text-writers on Islamic jurisprudence. In particular, I cannot brush aside the clear and pointed reference in the Hedaya and other sources to the liability of the father's property to answer the claim of maintenance of his minor children. In the Bombay case, *Mohamed Jusab* v. *Haji Adam*[3], cited earlier, the learned Judge had asserted, much too confidently, that there can be no authority under the Mohamedan Law for the proposition that the minor children are entitled to a charge on the father's property for their maintenance. The texts from Fathul Qadir and Sahih-ul Bokhari, to which I have made reference earlier, were not apparently brought to the notice of the learned Judge. The value of that decision as a precedent, is, therefore, so much less.

This being so, and in the absence of any other binding authority, I conceive that this Court and other Courts in this land must administer the personal law for Muslims on this difficult question only on the basis of the ancient textual authorities, whose validity as sources of law can hardly be questioned. Having regard to the tradition handed down from the Prophet himself in the two anecdotal reference I have earlier cited, there seems to me to be every judicial compulsion to follow the injunction which the Prophet administered to his followers as the only rule of law bearing on the subject of maintenance. Wihout attempting to discover exact parallels between one system of personal law and

1. (1897) 24 I.A. 196: I.L.R. 25 Cal. 9:7 M.L.J 115.
2. (1903) 30 I.A. 94: I.L.R. 25 All. 236.
3. (1911) I.L.R. 37 Bom. 71.

another I may make bold to assert that it would be quite purposeless and self-stultifying for any system of family law or jurisprudence worth the name to confer a right on minor children to maintenance, while allowing the parent, at the same time, the liberty of sapping the substance of that right.

25. Mr. Hadi had one last argument to make by way of criticism of the trial Court's judgment. That Court seemed to found the basis for a charge decree in this case on the provisions of section 39 of the Transfer of Property Act, 1882. Learned counsel said that this was the last provision one could look for and rely on in a case involving maintenance rights over a Muslim's property.

26. Section 39 of the Transfer of Property Act, it may be observed, lays down, *inter alia*, that a person's right to maintenance on a charge of the properties of another person may be enforced even against a transforce from that person, where transfer was gratutous. A similar provision, it may be mentioned, is also found in section 20 of the Hindu Adoptions and Maintenance Act, 1956. But Mr. Hadi's point was that section 39 of the Transfer of Property Act, had no application where the Courts have to administer rules of Mohamedan Law.

27. This contention has to be accepted on the basis of section 2 of the Transfer of Property Act. The effect of that saving provision is that rules of Mohamedan Law cannot be affected or overridden by section 39 or any other provision in Chapter 11 of the Transfer of Property Act. All the same, I cannot help observing that the particular rule of Mohamedan Law which I have been able to derive from the ancient texts far purposes of this case does not differ from, but more or less accords with, the principle on which section 39 of the Transfer of Property Act had been enacted.

28. At the end of the discussion I am quite satisfied that under the Mohamedan Law, minor children are entitled to have a decree for their maintenance made a proper charge on the property of the father. I hold that the children's right to maintenance in a Muslim household always attaches to the father's property in such a way and in such measure that it is not affected by any subsequent alienation by the father with notice of the charge or by an alienation which is gratuitous.

29. The result is that I confirm the judgment and decree of the Court below on the point, and dismiss the second appeal with costs.

R.S. —— *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Mohan, J.*

The Indian Institute of Technology, Madras-600036. .. *Petitioner**

v.

The Regional Provident Fund Commissioner, 22/23, Royapettah High Road, Madras .. *Respondent.*

Employees' Provident Funds and Miscellaneous Provisions Act (*XIX of* 1952), *section* 1 (3) (*c*)—*Mess run by the Indian Institute of Technology—Whether within the ambit of the Act.*

Held: If the mess run by the Indian Institute of Technology was not an independent one, but an integral part of its activities, in other words if it is subsidiary or incidental to the greater object of imparting technical education it is difficult to see how notwithstanding the fact that the Employees' Provident Funds Act is a social legislation intended to provide benefit to employees, it could still be extended to a mess of the above character. No doubt, some light is thrown in the Government Notification G.S.R. 299 dated 24th March, 1973 when it states that the Government of India had extended the provisions of the Act to messes other than military messes. Nevertheless, it should be so construed as not to violate the spirit of the definition as to apply to messes, which are the main and primary objects of an establishment. Otherwise, in every case the definition would be applicable and that will be virtually setting at naught the well-running of institutes like the petitioner, which certainly cannot be in the contemplation of this Act, however favourably it may be considered in favour of the employees. There is no scope for bringing in the messes

*W.P. No. 3562 of 1976. *23rd January,* 1979.

run by the Indian Institute of Technology which is an integral part of its institution and not an independent establishment within the four corners of the Act. [*Para.* 11.]

Case Referred to:—

Associated Industries (P.) Ltd. v. *Regional Provident Fund Commissioner*, (1964) 2 S.C.J. 154: (1964) 2 S.C.R. 905: A.I.R. 1964 S.C. 314.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of prohibition calling for the records of the respondent, Regional Provident Fund Commissioner relating to his proposal to collect contribution under the Employees' Provident Fund Scheme from the various hostels run by the Indian Institute of Technology, prohibiting the respondent from proceeding further with his proposal to levy contribution from the hostels run by the petitioner Institute under the Employees Provident Funds Act.

S.K.L. Ratan, for Petitioner.

Miss. Radha Srinivasan, Additional Central Government Standing Counsel on behalf of Respondent.

The Court made the following

ORDER.—An interesting question arises in this writ petition as to whether the messes run by the Indian Institute of Technology, Madras, petitioner herein, could be brought within the ambit of section 1 (3) (*b*) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, (hereinafter referred to as the Act). The facts are as under:—

2. The petitioner, Indian Institute of Technology, Madras, is a statutory body created by Central Act LIX of 1961. It is a Corporation sole. Section 31 of the Central Act empowers the Central Government to establish a Council. Section 27 of the Central Act authorises the Council to frame statutes with the previous approval of the Visitor (President of India). In pursuance of such power, the Council has framed staütes. Section 23 of the statutes provides as follows:

Halls and Hostels:

1. The institute shall be a residential institution and all students, research scholars and research fellows shall reside in the Halls of Residence and Hostels built by the Institute for the purpose.

In exceptional cases, the Director may permit a student, scholar or fellow to reside with his parent or guardian, but where any such permission is accorded to a student, scholar or fellow, such student, scholar or fellow, as the case may be, shall be liable for the payment of such seat rent as he would have been liable for the payment of seat rent had he resided in the Hostel.

2. Every resident in the Halls and Hostels shall conform to the rules laid down by the Senate for the purpose.

3. For each Hall of Residence there shall be a Warden and such number of Assistant Wardens and other staff as may be determined by the Board from time to time.

4. The offices of Warden and Assistant Warden shall be held by the members of the Academic Staff of the Institute. The appointments shall be made by the Director.

5. Wardens and Assistant Wardens shall be entitled to rent-free unfurnished quarters corresponding to the type of quarters to which they are normally entitled as teachers of the Institute. In addition, they shall be paid an allowance of Rs. 50 per mensem, provided that in case a Professor is appointed as Warden, he shall not be entitled to receive any allowance.

6. The management of the Halls of Residence and Hostels shall be in accordance with the rules laid down by the Director.

3. From the above, it would be seen that a statutory obligation is imposed on the petitioner herein to run a hostel. Consequently, it becomes obligatory on the part of the Institute to provide them with food. Separate unregistered Committees have been formed with a view to run the hostel under the supervision of the Institution. The kitchen attached to the hostels are part of the hostels. These hostels are subsidised from the funds of the Institute to a certain extent.

4. The Institute received a communication from the Regional Provident Fund Commissioner (Respondent) stating that the messes run by the hostels in the campus come within the purview of the Act and calling upon the Institute to appear before him with the

account books of the various messes run by the hostels in the campus under the overall control of the Institute. It was his main case that the messes would come within the purview of the Act. In view of the notification issued that messes would be covered by the provisions of the Act from 31st March, 1973 the petitioner pointed out that the primary object of the Institute is to provide residential accommodation to students who were compelled to reside in the campus and the fact that food was provided in the hostels will not make the kitchens attached to the hostels messes. In any event, provision for food to students was subsidiary, minor or incidental to the running of the hostel. In this view, even if the kitchens attached to the hostels can be characterised as messes, the object in running them being subsidiary or incidental to the main object of compelling students to reside in the hostels, the provisions of the Act cannot apply. This contention did not prevail with the respondent. It is under these circumstances, the present writ petition has been preferred by way of writ of prohibition to prohibit the respondent from proceeding further with his proposal to levy under the Act.

5. In the counter-affidavit of the respondent, the following stand is taken: To discharge the statutory obligation, the Institute is running Halls of Residence and Hostels for residential purposes and messes to provide food for the students. In this connection, it is pointed out that mess is a place where food is provided regularly to a group of people. Similarly, students residing in the Halls of residence and Hostels are provided regularly with food. It is immaterial whether the messes are being run independently or as kitchens attached to the Hostels. Such kitchens, attached to the Halls of Residence and Hostels, which provide food regularly to the students, are none other than messes.

6. By G.S.R. No. 299 dated 24th March, 1973, the Government of India have extended the provisions of the Act and the schemes framed thereunder to messes other than military messes with effect from 31st March, 1973. As the Institute is running 11 messes attached to the Hostels, the Provident Fund Inspector contacted the various officials of the Institute to examine the applicability of the Act to the said messes. But, the petitioner did not produce the necessary records even for examining the applicability of the Act. Therefore, the petitioner was called to attend an enquiry under section 7-A of the Act. The applicability of the Act was explained to the Director and Registrar of the Institute. They were persuaded to produce the accounts and after examining the matter in detail, it was proposed to cover the messes attached to the hostels under the Act. Accordingly, they were brought within the purview of the Act.

7. It is denied that providing of food to the students was subsidiary, minor or incidental to the running of hostels. While the students are compelled to reside, in the campus as provided under section 23 (1) of the Statutes of the Institute, it is an obligation to provide residential accommodation. Similarly, the Institute is under the obligation to provide food to such students. In so far as, the kitchens provide food regularly to the students residing in the hostels run by the unregistered committees under the superintendence of the Institute which provides funds to them to a certain extent, it cannot be claimed that the petitioner has a subsidiary, minor or incidental activity to the running of the hostels. Even then, the establishment would still be coverable under the Act.

8. It is true that the Director of the Institute suggested to the respondent to refer the dispute in question to the Central Government to get a decision in this matter. A fair reading of section 19-A of the Act may lead to the conclusion that it is the responsibility of the party concerned who is having any difficulty in giving effect to the provisions of the Act and in particular, if any doubt arises to refer the issue to the Central Government to get a direction for the removal of the doubt or difficulty. The respondent has no such doubt or difficulty about the applicability of the Act to the messes attached to the hostels of the Institute.

9. It is immaterial for the purposes of coverage of the messes whether such messes run by the hostels are integral part of them or they exist as a separate entity. Hence, the contention of the petitioner cannot prevail. For all these reasons, there is absolutely no ground for the issue of a writ of prohibition. Accordingly, the respondent prays that the petition may be dismissed.

No reply affidavit has been filed.

Mr. S.K.L. Ratan, learned counsel for the petitioner after drawing my attention to the statutory provisions submits that under those

provisions the Indian Institute of Technology, the petitioner, is obliged to run a hostel and thereby have a mess which would constitute an integral part. Such a mess, would not be an establishment within the meaning of the Act, because it is not a main activity of the Institute. It is only an incidental, minor or a subsidiary activity. According to him in other words, if by reason of statutory obligation it becomes necessary on the part of the Institute to provide hostel accommodation which hostel accommodation is not complete without a mess, such a mess cannot be brought within the terms of the notification issued under the Act. In support of this submission, he relies on the decision in *Associated Industries (P.) Ltd.* v. *Regional Provident Fund Commissioner, Kerala*,[1] and particularly the passage occurring in page 316, and proceeds to contend that it is not every mess that could be brought within the terms of the notification. It must be a main or the only part of its activity and not incidental thereto. Having regard to the fact that the Institute is a residential university, provision of a mess becomes necessary and in such a case, the decision cited fully applies.

10. Kumari Radha Srinivasan, learned counsel for the Department, would draw my attention to the notification and state that in matters of this kind it should be applied because it is a social legislation. Whether the mess is run as a main activity or a subsidiary activity, so long as there is an establishment employing more than 19 persons, it would be covered by the provisions of the Act. It is also clear according to the that when exemption is granted to messes other than military messes, every other messes ought to be included, be it carried on mainly or incidentally.

11. It is true that the act is a social legislation. In my considered view, the test to be applied is, is it an establishment which has the avowed purpose of running messes. If it is so, certainly that would be brought within the notification, which says messes other than military messes. At this stage, it may be relevant to note the definition of establishment under section 1 (3) (*b*) of the Act, which says:

> "to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf."

Only by virtue of this, Notification No. G.S-R. No. 299, dated 24th March, 1973 has been issued with effect from 31st March, 1973, so as to cover the messes. The concept of the Indian Institute of Technology, Madras, must be kept in that background to appreciate this question. I have already extracted in full the statutory requirements under section 23 to provide halls and hostels. If according to clause (1) of that section, it is a residential institution, all students will have to be necessarily provided with accommodation or lodging facilities. The definition of "Hostel" as stated in Shorter Oxford English Dictionary (Page 925) is

1. a place of sojourn or lodging
2. an inn, or a hotel
3. a house of residence for students especially (in recent times) for students-connected with a non-resident college
4. A town mansion.

It is item No. 3 of the definition which applies to this case. If the Institute is a residential institution more so when stringent provisions are made requiring the students or scholars to make the payment of seat rent as he would have been liable for the payment of seat rent had he resided in the hostel, certainly it cannot be said that the term hostel should be construed as merely a place of sojourn or a lodging. Having regard to this, it becomes all the more obligatory on the part of the Institute to run a mess. When it runs a mess, it does it incidentally. In other words, it is an integral part of the various other activities, the primary activity being to impart technical education. The running of a mess is incidental, subsidiary and is not an independent one. The mess is not an independent establishment. It was this that was propounded by their Lordships in *Associated Industries (P.) Limited* v. *Regional Provident Fund Commissioner Kerala.*[1]

> "This decision makes it clear that section 1 (3) (*a*) is not confined only to factories which are exclusively engaged in industrial work to which Sch. I applies, but it also takes in composite factories which run industries some of which fall under Sch. I and some do not. In order to make the position clear

1. (1964) 2 S.C.J. 154: (1964) 2 S.C.R. 905: A.I.R. 1964 S.C. 314.

1. (1964) 2 S.C.J. 154: (1964) 2 S.C.R. 905: A.I.R. 1964 S.C. 314.

let us state the true legal position in respect of the scope of the application of section 1 (3) (*a*) in categorical terms. If the factory carries on one industry which falls under Sch. I and satisfied the requirement as to the number of employees prescribed by the section, it clearly falls under section 1 (3) (*a*). If the factory carries on more than one industry all of which fell under Sch. I and its numerical strength satisfies the test prescribed in that behalf, it is an establishment under section 1 (3) (*a*). If a factory runs more industries than one, one of which is the primary and the dominant industry and the others are its feeders and can be regarded as subsidiary, minor, or incidental industries in that sense, then the character of the dominant and primary industry will determine the question as to whether the factory is an establishment under section 1 (3) (*a*) or not. If the dominant and primary industry falls under Schedule I, the fact that the subsidiary industries do not fall under Schedule I will not help to exclude the application of section 1 (3) (*a*). If the dominant and primary industry does not fall under Schedule I, but one or more subsidiary, incidental, minor and feeding industries fall under Schedule I, then section 1 (3) (*a*) will not apply. If the factory runs more industries than one all of which are independent of each other and constitute separate and distinct industries, section 1 (3) (*a*) will apply to the factory even if one or more, but not all, of the industries run by the factory fall under Schedule . The question about the subsidiary, minor, or feeding industries can legitimately arise only where it is shown that the factory is really started for the purpose of running one primary industry and has undertaken other subsidiary industries only for the purpose of subserving and feeding the purposes and objects of the primary industry; in such a case, these minor industries merely serve as departments of the primary industry; otherwise if the industries run by a factory are independent, or are not so integrated as to be treated as part of the same industry, the question about the principal and the dominant character of one industry as against the minor or subsidiary character of another industry does not fall to be considered."

Applying this test in the instant case, if it is not an independent one, but, an integral part of its activities, in other words, it is subsidiary or incidental to the greater object of imparting technical educarion, I fail to see how, notwithstanding the fact that the Act is a social legislation intended to provide benefit to employees, it could still be extended to a mess of this character. No doubt, some light is thrown in the notification, when it refers to messes other than military messes. Nevertheless, it should be so construed as not to violate the spirit of the definition as to apply to messes, which are the main and primary objects of an establishment. Otherwise, in every case like the one we have on hand, this definition would be applicable and that will be virtually setting at naught the well-running of institutes like the petitioner, which certainly cannot be in contemplation of this Act, however favourably it may be considered in favour of the employees. Thus, I am of the view that there is no scope for bringing in the messes run by the petitioner, *viz.*, Indian Institute of Technology, Madras, which is an integral part of its institution and not an independent establishment within the four corners of the Act. Accordingly, this petition is allowed and there will be no order as to costs.

R.S. ——— *Writ petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Antony Viagulam Fernando, through his power of Attorney Augustine .. *Petitioner**

v.

The Authorised Officer (Land Reforms) Kovilpatti, Tirunelveli District .. *Respondent.*

(A) *Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961) and Succession Act (XXXIX of 1925), section 213 (1)—Authorised Officer functioning under the Act of 1961 whether a 'Court' or a 'Court of Justice' within the meaning of section 213 (1) of the Indian Succession Act.*

(B) *Evidence Act (I of 1872), section 3 —'Court'— Authorised Officer functioning under the Act of 1961, a Court.*

Held, that the Authorised Officer uuder the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act cannot be equated to a 'Court' or a 'Court of justice' for the purpose of section 213 (1) of the Indian Succession Act and it would not be proper for him to insist upon the satisfaction of the requirements under section 213 (1) of the Indian Succession Act before taking note of the supplements under a will. [*Para.* 14.]

The right to receive evidence is not an incident of any forum judicial or otherwise. But, if the statute which constitutes the forum confers a power on it to receive evidence, that would definitely bring the forum within the meaning of 'Court' under the Evidence Act. In the course o proceedings before the Authorised Officer under the Land Reforms Act the adducing of evidence before him is contemplated. Section 9 (2) (*b*) of the Act enables the person concerned to make his representation and adduce evidence; and this representation and evidence will have to be the subject-matter of consideration under section 10 of the Act by the Authorised Officer. In this context, rule 11 framed under the Act, when it says that the provisions of the Code of Civil Procedure with regard to the examination of parties and witnesses shall govern the proceedings of the Authorised Officer, cannot be lost sight of. The considerations which should weigh for the purpose of finding out as to the applicability or otherwise of the Evidence Act to a particular proceeding, will be different from those for the purpose of finding out as to whether a particular forum is a 'Court' or a 'Court of Justice' or not within the meaning of section 213 (1) of the Indian Succession Act. The definition of a Court for the purpose of the Evidence Act, as embodied in section 3 thereof appears to be wider in scope. It can take in persons legally authorised to take evidence. The Authorised Officer will definitely come within the definition of 'Court' under section 3 of the Evidence Act. [*Para.* 16.]

Cases referred to:—

R.M. Seshadri v. *Second Additional Income-tax Officer,* (1954) 2 M.L.J. 285: 67 L.W. 528: A.I.R. 1954 Mad. 806: I.L.R. (1954) Mad. 1236; *Athani Municipality* v. *Labour Court,* (1970) 1 S.C.J. 1: (1970) 1 S.C.R. 51: (1969) 1 S.C.C. 873: A.I.R. 1969 S.C. 1335; *Nityanand* v. *Life Insurance Corporation of India,* (1969) 2 S.C.J. 749: (1970) 1 S.C.R. 396: A.I.R. 1970 S.C. 209; *Nagoodas* v. *Khandappa,* A.I.R. 1970 Mys. 166; *Bandoo Banaji* v. *Bhaskar Balaji,* A.I.R. 1972 Mys. 311; *Ganapathy* v. *Kumaraswami,* (1975) 2 M.L.J. 197; *Commissioner of Sales Tax* v. *Parson Tools & Plants,* (1975) 35 S.T.C. 413: (1975) 3 S.C.R. 743: (1976) 1 S.C.J. 242: (1975) 4 S.C.C. 22: (1975) Tax. L.R. 1529: A.I.R. 1975 S.C. 1039; *Susila Devi* v. *Ramnandan Prasad,* (1976) 1 S.C.C. 361: 1976 2 S.C.R. 845: A.I.R. 1976 S.C. 177; *Cooper* v. *Wilson,* (1937) 2 K.B. 309; *Brajnandan Singh* v. *Jyothi Narain,* (1955) 2 S.C.R. 955: 1956 S.C.J. 155: I.L.R. (1956) Pat. 65: A.I.R. 1956 S.C. 66; *State of Uttar Pradesh* v. *Ratan Shukla,* A.I.R. 1956 All. 258. *Bunakar Coal Co.* v. *Labour Appellate Tribunal,* A.I.R. 1958 Cal. 226; *Bharat Bank Ltd.* v. *Employees of the Bharat Bank Ltd.,* 1950 S.C.R. 459: A.I.R. 1950 S.C. 188.

Petition under section 83 of Land Reforms Act (LVIII of 1961) praying the High Court to revise the Order of the Court of the Land Tribunal (Subordinate Judge), Tuticorin dated 21st September, 1976 and made in C.M.A. (L.T.) No. 2 of 1976 (MR 1/64/R/SKL dated 26th March, 1976 of the Authorised Officer, Land Reforms, Kovilpatti.

K. Parasaran, for Petitioner.

K. Venkataswami, Additional Government Pleader, for Respondent.

*C.R.P. No. 605 of 1977. 18*th April,* 1979.

The Court delivered the following

JUDGMENT:—Antony Viagulam Fernando—the landowner within the meaning of Tamil Nadu Land Reforms (Fxation of Ceiling on Land) Act, LVIII of 1961, hereinafter referred to as the Act, is the petitioner in this revision. The landowner held an extent of 25.49 ordinary acres. He had a son by name Selvakumar, who held an extent of 43.09 ordinary acres. The landowner has a wife by name Celia Costa. The landowner has an unmarried daughter by name Marina. Out of the total extent of 25.49 ordinary acres, the landowner executed a deed of settlement on 30th September, 1970, giving his unmarried daughter Marina an extent of 7.53 ordinary acres. On the same day, the mother of the landowner and the grand-mother of Marina settled on Marina an extent of 7 ordinary acres. The son Selvakumar died on 16th November, 1967. He is said to have a left a will dated 30th May, 1967 under which the lands held by him of an extent of 43.09 ordinary acres, have been bequeathed in equal moieties to the mother Celia Costa and to one Francis Baldans, stated to be a close associate of Selvakumar. Proceedings under the Act have been taken by the Authorised Officer (Land Reforms), Kovilpatti, in respect of the above holdings. All the lands *viz.*, 25.49 ordinary acres which stood in the name of the landowner, including 7.53 ordinary acres gifted away to his daughter Marina; 43.09 ordinary acres which stood in the name of Selvakumar, the Revenue Registry in respect of which is transferred in the name of the mother Celia Costa subsequently; and 7 ordinary acres gifted to Marina by her grandmother, have been pooled for the purpose of the Act and the Authorised Officer passed orders under section 9 (2) (*b*) of the Act. The Authorised Officer declined to give effect to the Will and did not take note of the settlements in favour of the daughter, Marina.

2. Aggrieved by the order of the Authorised Officer, the landowner preferred an appeal C.M.A. (L.T.) No. 2 of 1976 which was heard and disposed of by the Land Tribunal (Subordinate Judge), Tuticorin and the Land Tribunal except with regard to the settlements in favour of the daughter Marina, found no justification for interference and dismissed the appeal. In respect of the lands covered by the settlements in favour of the daughter Marina, the Land Tribunal directed that the matter could be agitated in the course of the enquiry under section 10 (5) of the Act. The present revision is directed against the judgment and decree of the Land Tribunal.

3. Mr. K. Parasaran, learned counsel appearing for the petitioner impeaches the judgment of the Land Tribunal on four grounds. It must be noted that the submissions of the learned counsel are only on the very same four grounds on which the Land Tribunal would not countenance the claims of the landowner. The first ground on which the Land Tribunal declined to countenance the will dated 30th May, 1967, said to have been executed by the son Selvakumar is that, the said Will will come within the mischief of section 213 (1) of the Indian Succession Act, (XXXIX of 1925.) Section 213 (1) reads as follows:

> "No right as executor or legatee can be established in any Court of justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed".

The will is stated to have been executed by the deceased Selvakumar in Ceylon. There is no dispute that with regard to the will in question no Court of competent jurisdiction in India has granted probate of the same or granted letters of administration with the will or with a copy of an authenticated copy of the will annexed within the meaning of section 213 (1) of the Indian Succession Act. The submission of Mr. K. Parasaran on this question is, the Authorised Officer functioning under the Act is neither a 'Court' nor a 'Court of justice', so that it could be stated that the satisfaction of section 213 (1) of the Indian Succession Act is mandatory for the purpose of establishing the rights under the will. According to the learned counsel, the Authorised Officer functions for a specifed purpose adumbrated in the Act and he cannot be equated to a Court or a Court of Justice; so as to say that before the will could be pressed into service to show the devolution of the rights in the properties covered by the will, it ought to have been probated within the meaning of section 213 (1) of the Indian Succession Act. This submission of the learned counsel is not without substance. Mr. K. Venkataswami, learned Additional Government Pleader appearing for the respondent, does not dispute the proposition that if the Authorised Officer is not

a 'Court' or a 'Court of justice' within the meaning of section 213 (1) of the Indian Succession Act, the satisfaction of the requirements under that section cannot be insisted upon before the devolution of the rights in the properties as set out in the will could be countenanced. The bar to the establishment of the rights under section 213 (1) of the Indian Succession Act is only for its establishment in a 'Court of justice' and not its being referred for to and relied on in other proceedings before administrative or other tribunals. Hence, the question that comes up for consideration is as to whether the Authorised Officer functioning under the Act is a 'Court' or a 'Court of justice' within the meaning of section 213 (1) of the Indian Succession Act. Halsbury's Laws of England, Fourth Edition, Volume 10, Paragraph 701 deals with the meaning of 'Court' as follows: —

"701. Meaning of 'Court'. Originally the term 'Court' meant, among other things, the Sovereign's palace. It has acquired the meaning of the place where justice is administered and, further, has come to mean the persons who exercise judicial functions under authority derived either directly or indirectly from the Sovereign. All tribunals, however, are not Courts, in the sense in which the term is here employed. Courts are tribunals which exercise jurisdiction over persons by reason of the sanction of the law, and not merely by reason of voluntary submission to their jurisdiction. Thus, arbi rators committees of clubs and the like, although they may be tribunals exercising judicial functions, are not 'Courts' in this sense of that term. On the other hand, a tribunal may be a Court in the strict sense of the term even though the chief part of its duties is not judicial. Parliament is a Court. Its duties are mainly deliberative and legislative, the judicial duties are only part of its functions. A coroner's Court is a true Court although its essential function is investigation".

4. Again, at paragraph 702, as to what is a Court in law is set out in the following terms:

"702. What is a Court in law? The question is whether the tribunal is a Court, not whether it is a Court of justice, for there are Courts which are not Courts of justice. In determining whether a tribunal is a judicial body the facts that it has been appointed by a non-judicial authority, that it has no power to administer an oath, that the chairman has a casting vote, and that third parties have power to intervene are immaterial especially if the statute setting it up prescribes a penalty for making false statements; elements to be considered are (1) the requirement for a public hearing, subject to a power to exclude the public in a proper case, and (2) a provision that a member of the tribunal shall not take part in any decision in which he is personally interested, or unless he has been present throughout the proceedings.

A tribunal is not necessarily a Court in the strict sense of exercising judicial power merely because (1) it gives a final decision; (2) it hears witnesses on oath; (3) two or more contending parties appear before it between whom it has to decide; (4) it gives decisions which affect the rights of subject; (5) there is an appeal to a Court; and (6) it is a body to which a matter is referred by another body".

5. In *R.M Seshadri* v. *Second Additional Income-tax Officer*[1], a Division Bench of this Court consisting of Satyanarayana Rao and Rajagopalan, JJ., had occasion to consider the question as to whether the Income-tax Appellate Tribunal, constituted under the Income-tax Act, is a 'Court'. The learned Judges, after elaborately discussing a number of authorities throwing light on this question, answered the question in the negative. The following passage in the judgment of the learned Judges, at page 808, is useful to assess the question in the present case also:

"A definition of Court is to be found in Stroud's Judicial Dictionary in which it is stated that a Court is a place where justice is judicially administered. The difficulty at the present juncture is created on account of the establishments of administrative Tribunals, which are vested with jurisdiction to decide certain matters of a quasi-judicial nature. It is often a very difficult task to draw the line, and distinguish a Court from an administrative tribunal exercising quasi-judicial functions. Merely because the administrative Tribunals have the trappings of a Court, they are not Courts in the sense of exercising judicial power".

6. With regard to the application of the provisions of the Limitation Act to proceedings before the Authorities who are creatures of

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1. (1954) 2 M.L.J. 285: 67 L.W. 528: I.L.R. (1954) Mad. 1236: A.I.R. 1954 Mad. 806.

statutes, Courts, including the highest in this land, have uniformly held that such statutory functionaries are not 'Courts' so as to attract the provisions of the Limitation Act. In *Athani Municipality* v. *Labour Court, Hubli*[1], the Supreme Court declined to apply the provisions of the Limitation Act to an application under section 33-C (2) of the Industrial Disputes Act. At page 1343 of the report, the relevant passage reads as follow:—

> "One factor at least remains constant and that is that the applications must be to Courts to be governed by the articles in this division. The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than Courts, such as a quasi-judicial tribunal, or even an executive authority. An Industrial Tribunal or a Labour Court dealing with applications or references under the Act are not Courts and they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure".

The same view has been reiterated in *Nityanand* v. *Life Insurance Corporation of India*[2].

7. In *Nagireddy* v. *Khandappa*[3], a Division Bench of the Mysore High Court, dealt with the questions as to the applicability of section 5 of the Limitation Act to an application filed before the Munsif under rule 17 of the Mysore Village Panchayats (Election of the Chairman and the Vice Chairman) Rules, 1959 The Bench held that the Munsif, functioning under the Rules is only a *persona designata* and hence the provisions of the Limitation Act cannot be invoked. In *Bandoo Banaji* v. *Bhaskar Balaji*[4], another Division Bench of the Mysore High Court held that the Tribunal under the Mysore Land Reforms Act, 1961 is not a 'Court' and the Division Bench relied on the decisions of the Supreme Court referred to above.

8. In *Ganapathy* v. *Kumaraswami*[5], the question posed before Gokulakrishnan, J., was as to whether the provisions of the Limitation Act could be invoked for the purposes of proceedings before the Appellate Authority under the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960). The learned Judge. after considering the provisions of Act XVIII of 1960 in the light of the judicial pronouncements, found that the Appellate Authority is a creature of statute and he is only a *persona designata* and hence the provisions of the Limitation Act cannot be applied to proceedings before him.

9. In *Commissioner of Sales Tax* v. *Parson Tools and Plants*[1], the Supreme Court held that the Appellate Authority and the Judge (Revisions), Sales Tax, exercising jurisdiction under the Sales Tax Act are not 'Courts' but are merely administrative tribunals.

10. In *Sushila Devi* v. *Ramnandan Prasad*[2], the Supreme Court was concerned with an application under section 3 of Kosi Area (Restoration of Lands to Raiyats) Act (XXX of 1951). On the question as to the applicability of section 5 of the Limitation Act to such an application, the Supreme Court observed as follows (at page 182):

> "We do not see how section 5 could be invoked in connection with the application made on 17th October, 1975 by the first respondent. Under section 5 of the Limitation Act an appeal or application 'may be admitted after the prescribed period if the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period'. The Collector to whom the application was made was not a Court, though section 15 of the Act vested him with certain specified powers under the Code of Civil Procedure; also, the kind of application that was made had no time limit prescribed for it, and no question of extending the time could therefore arise."

11. In *Nachimuthu Gounder* v. *Kanagarathnam*[3] Ramaprasada Rao, J., as he then was, was meeting the argument that in respect of an application for restoration under section 4 (5).

1. (1970 1 S.C.R. 51: (1969) 1 S.C.C. 873: (1970) 1 S.C.J. 1: A.I.R. 1969 S.C 1335.
2. (1969) 2 S.C.J. 749: (1970) 1 S.C.R. 396: A.I.R. 1970 S.C. 209.
3. A.I.R. 1970 Mys. 166.
4. A.I.R. 1972 Mys. 311.
5. (1975) 2 M.L.J. 197.

1. (1975) 35 S.T.C. 413: (1975) 3 S.C.R. 7 3: (1976) 1 S.C.J 242: (19 5) 4 S.C.C. 22: (1975) Tax. L.R. 1529: A.I.R. 1975 S.C. 1039.
2. (1976 1 S.C.C. 361: (1976) 2 S.C.R. 845: A.I.R. 1976 S.C. 177.
3. C.R.P. No. 838 of 1975: (1977) T.L.N.J. 393.

of the Tamil Nadu Cultivating Tenants' Protection Act (XXV of 195-), section 5 of the Limitation Act can be taken aid of, the learned Judge found that the Revenue Divisional Officer or Revenue Court is not a 'Court', even though it has the trappings of a Court in that certain provisions of the Code of Civil Procedure are made applicable to a proceeding before it. In that view, the learned Judge negatived the plea for application of the Limitation Act to such proceedings before such forums.

12. Coming to the present Act, the constitution of the Authorised Officer under section 3 (5) of the Act seems to be on terms similar to the constitution of the Controller under the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960). Section 3 (5) of the Act reads as follows:

> " 'Authorised Officer' means any Gazetted Officer authorised by the Government by notification to exercise the powers conferred on, and discharge the duties imposed upon, the Authorised Officer under this Act for such area as may be specified in the notification."

The scope of the powers conferred on the Authorised Officer does not make them judicial and the decisions which he has to give under the provisions of the Act cannot be equated to judicial decisions of Courts. The following passage in *Cooper* v. *Wilson*[1], succinctly lays down the position as to what would constitute a true judicial decision.

> "A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites : (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, then the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal arguments by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law."

1. (1937) 2 K.B. 309.

13. In this context, it would be pertinent to refer to section 11 of the Act with regard to the scope of the powers of the Authorised Officer to decide questions of title in certain cases. It says that he has got powers to decide such questions summarily and that summary order could be the subject-matter of a regular suit under sub-section (3). Whenever the decision involves a substantial question of law or of fact, the Authorised Officer is enjoined to refer the matter to the Land Tribunal for its decision. This is embodied in sections 11 (2), 16 (3) (*a*) (iv) and 51 (3) of the Act. This definitely does not satisfy the fourth requisite contemplated in *Cooper* v. *Wilson*[1]. It is brought to my notice that rule 11 of the Rules framed under the Act invokes certain provisions of the Code of Civil Procedure, to govern the procedure to be followed by the Authorised Officer. This would not alter the position. There is no warrant for holding that a statutory functionary, who is not a 'Court' would become a 'Court' merely because some or the other of the procedural provisions of the Code of Civil Procedure would govern the conduct of proceedings before it. As pointed out in *Sushila Devi* v. *Ramnandan Prasad*[2] and *Nachimuthu Gounder* v. *Kanagarathnam*[3], merely because the statutory functionary has the trappings of a 'Court' by the investiture of the procedural powers under the Code of Civil Procedure, it cannot be equated to a 'Court'. It is significant to note that rule 11 lays down that the proceedings of the Authorised Officer shall be summary. Section 20 of the Indian Penal Code defines 'Court of justice' as under :

> "The words 'Court of justice' denote a Judge who is empowered by law to act judicially alone or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially."

Section 19 of the Indian Penal Code defines 'Judge' as follows :

> "The word 'Judge' denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, Civil or Criminal, a definitive judgment, or a judgment which, if not appealed against

1. (1937) 2 K.B. 309.
2. (1976) 2 S.C.R. 845 A.I.R. 1976 S.C. 177.
3. C.R.P. No. 838 1975; (1977) T.L.N.J. 393.

would be definitive. or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons which body of persons is empowered by law to give such a judgment."

The following passage in *Brajnandan Singh* v. *Jyoti Narain*[1], is also elucidative on the point:

"The pronouncement of a definitive judgment is thus considered the essential *sine qua non* of a Court and unless and until a binding and authoritative judgment can be pronounced by a person or body of persons it cannot be predicated that he or they constitute a Court."

In view of the provisions of the Act, it is not possible to hold that the Authorised Officer gives any definitive judgment on substantial questions of law or of fact.

14. The only conclusion which could emerge from the preceding discussion is, the Authorised Officer under the Act cannot be equated to a 'Court' or a 'Court of Justice for the purposes of section 213 (1) of the Indian Succession Act. If this position is accepted, then it would not be proper to insist upon the satisfaction of the requirements under section 213 (1) of the Indian Succession Act with regard to the will in question.

15. The second ground on which the Land Tribunal declined to accept the will is that under section 68 of the Evidence Act, the will must be proved before the Authorised Officer, by calling at least one attesting witness. The argument of Mr. K. Parasaran, learned counsel appearing for the petitioner, is that the Authorised Officer could not also fall within the definition of a 'Court' under the Evidence Act and hence, to invoke the provisions of the Evidence Act for the purpose of proof of the will in question is a misconception. I am not able to appreciate and accept this submission of the learned counsel in view of the implications of the provisions of the Evidence Act. Section 1 of the Evidence Act states that the Act applies to all judicial proceedings in or before any Court. Section 3 of the Evidence Act defines 'Court' in the following terms:

" 'Court' includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence."

It has been pointed out by the Supreme Court in *Brajnandan Singh* v. *Jyoti Narain*[1], that the definition of 'Court' in section 3 of the Evidence Act is not exhaustive, but framed only for the purpose of that Act and is not to be extended where such an extension is not warranted. This clearly indicates that the Evidence Act has got a purpose to serve and to serve that purpose persons who are legally authorised to take evidence, can come within the meaning of 'Court' under section 3 of the Evidence Act. As pertinently pointed out by the Division Bench in *State of Uttar Pradesh* v. *Ratan Shukla*[2], the words 'legally authorised' contemplate a positive authorisation.

16. It is true that the right to receive evidence is not an incident of any forum, judicial or otherwise. But, if the statute which constitutes the forum confers a power on it to receive evidence, that would definitely bring the forum within the meaning of 'Court' under the Evidence Act. In the course of proceedings before the Authorised Officer, the adducing of evidence before him is contemplated. Section 9 (2) (*b*) of the Act enables the person concerned to make his representation and adduce evidence; and this representation and evidence will have to be the subject-matter of consideration under section 10 of the Act by the Authorised Officer. In this context, rule 11 framed under the Act, when it says that the provisions of the Code of Civil Procedure with regard to the examination of parties and witnesses shall govern the proceedings of the Authorised Officer, cannot be lost sight of The considerations which should weigh for the purpose of finding out as to the applicability or otherwise of the Evidence Act to a particular proceeding, will be different from those for the purpose of finding out as to whether a particular forum is a 'Court' or a 'Court of Justice' or not within the meaning of section 213 (1) of the Indian Succession Act. The definition of a 'Court' for the purpose of the Evidence Act, as embodied in section 3 thereof appears to be wider in scope. It can take in persons legally authorised to take evidence.

17. Under section 11 (3) of the Industrial Disputes Act, 1947, evey Board, Court, and Tribunal constituted under that Act has been granted the same powers as one vested in the

1. 1956 S.C.J. 155: (1955) 2 S.C.R. 955: (1956) I.L.R. 35 Pat. 65: A.I.R. 1956 S.C. 66.

1. 1956 S.C.J. 155: (1955) 2 S.C.R. 955: A.I.R. 1956 S.C. 66.

2. A.I.R. 1956 All. 258.

civil Courts under the Code of Civil Procedure, when trying a suit, in respect of enforcing the attendance of any person and examining him on oath. Construing the above provisions, Sinha, J., in *Burrakar Coal Co., Ltd.* v. *Labour Appellate Tribunal*[1], held that an Industrial Tribunal is a 'Court' within the definition of section 3 of the Evidence Act. The learned Judge placed reliance on the following dictum of Mahajan, J., in *Bharat Bank Ltd., Delhi* v. *Employees of the Bharat Bank Ltd, Delhi*[2] with reference to the provisions of the Industrial Disputes Act:

> "It is difficult to conceive in view of those provisions that the Industrial Tribunal performs any functions other than that of a judicial nature."

18. The duty enjoined on the Authorised Officer to take evidence if offered and consider the same under sections 9 (2) (*b*) and 10 (1) of the Act read with rule 11 framed under the Act, bring the proceeding before the Authorised Officer within the complex of judicial proceedings. Such evidence cannot, but be legal evidence.

19. Hence, I am inclined to hold that the Authorised Officer will definitely come within the definition of 'Court' under section 3 of the Evidence Act. The term 'judicial proceeding' occurring in section 1 of the Evidence Act has not been defined by the said Act. Section 2 (*i*) of the Code of Criminal Procedure, 1973, corresponding to section 4 (*m*) of the Code of Criminal Procedure, 1898, defines 'judicial proceeding' as follows:

> " 'Judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath;"

If, in the course of a proceeding evidence is permitted to be taken and the decision in the proceeding is to rest on such evidence, the proceeding will come within the definition of 'judicial proceeding'. For all the reasons stated above, it must be held that the application of the Evidence Act cannot be eschewed for the purpose of proceedings before the Authorised Officer under the Act. The truth, genuineness and validity of the will in question in the eye of law, before it could be accepted for the purpose of the present proceedings, need not be over-stressed. They have got to be proved before the Authorised Officer, before he could be called upon to accept and act upon them. The Authorised Officer points out that the attestors of the will are also residents of Ceylon and in spite of the opportunities given to the landowner's power agent, he could not offer adequate proof of the will. Since it has now been held that obtaining probate within the meaning of section 213 (1) of the Indian Succession Act need not be insisted upon before the will could be acted upon and accepted for the purpose of the proceedings before the Authorised Officer, I am inclined to grant a further opportunity to the landowner to prove the truth, genuineness and validity of the will in the eye of law, before the Authorised Officer and for this purpose, the matter will have to be remitted back to the Authorised Officer for a fresh consideration.

20. The third ground which has weighed with the Land Tribunal on the question of the will is that the will has not been acted upon. May be, after the death of the son Selvakumar, the Revenue Registry was transferred in the name of the mother Celia Costa. But, on that ground the Court cannot hold that the will has not been acted upon. If once the will is accepted as a genuine and true document, the rights of the parties under the will have got to be given effect to and it is not possible to ignore the incidence of devolution of rights under the will on the ground that the will has not been acted upon, unless such rights are put an end to in any manner known to law. I find that the statement that the will has not been acted upon, cannot be sustained because the order of the Authorised Officer clearly states that both the mother Celia Costa and Francis Baldans, the other legatee submitted separate returns on 12th December, 1975 and 18th December, 1975 respectively, showing equal moieties in the properties and they have agitated their rights by engaging a general power agent. Hence, this reasoning of the Land Tribunal cannot be sustained.

21. The fourth aspect of the case is with reference to the extents covered by the settlement deeds dated 30th September, 1970 in favour of the daughter Marina. The Tribunal accepts that the said settlements could survive in view of the provisions of section 21-A (*b*) read with section 3 (14), *Explanation II* (*b*) of the Act. Having found a warrant for countenancing such settlements, the Tribunal wants to relegate the questions of their consideration to

1. A.I.R. 1958 Cal. 226.
2. 1950 S.C.R. 459: A.I.R. 1950 S.C. 188.

the stage of enquiry under section 10 (5) of the Act on the ground that this point has not been discussed by the Authorised Officer in his order in appeal before it. This approach cannot be sustained for the simple reason that a matter which is borne out by records could as well be decided at the earliest stage of the proceedings under the Act and it is not conducive to relegate it to a later stage. In view of the position in law which warrants the exclusion of the extents covered under those two settlement deeds, the proceedings against the landowner cannot include those extents.

22. For the reasons set out above, this revision is allowed and the matter is remitted back to the Authorised Officer (Land Reform), Kovilpatti, for the purpose of adjudicating and deciding about, the truth, genuineness and validity of the will dated 30th May, 1967 said to have been left by Selvakumar, the son of the landowner and in the light of the above decision to further decide the tenability or otherwise of the proceedings under the Act. The landowner will be at liberty to adduce evidence and place materials before the Atthorised Officer in proof of the genuineness, truth and validity of the said will in the eye of law and the Authorised Officer will gave the landowner sufficient and reasonable opportunity and time for the said purpose. The Authorised Officer may exclude the extents covered by the two settlements dated 30th September, 1970 in favour of the daughter Marina from the holdings of the landowner. There will be no order as to costs in this revision.

R.S. ——— *Revision allowed and case remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT:—*A. Varadarajan, J.*

The Sirsilk Limited, Sripur, Kaghaznagar, Andhra Pradesh .. *Petitioner**

v

The Distillery Officer, Tiruchirapalli-4 and others ... *Respondents.*

Tamil Nadu Distillery Rules (1960), *rule* 42—*Whether* ultra vires *of the Constitution and of the Prohibition Act* (*X of* 1937)—*State Legislature whether competent to legislate on rectified spirits*—*Whether levy under rule* 42 *is violative of Article* 19 *of the Constitution*—*Levy of duty without proof of contumacious conduct of consignor illegal*—*Levy without notice violative of principles of natural justice.*

During transport of rectified spirit sold from Tiruchirapalli to Kagaznagar after complying with the necessary formalities there was loss of spirit in transit beyond the permissible limit. The Distillery Officer levied a penalty under rule 42 of the Tamil Nadu Distillery Rules, 1960. The validity of the rule and the levy were challenged.

Held: Rectified spirit is not alcoholic liquor for human consumption falling within Entry 51 of List II in Schedule VII of the Constitution of India. It falls within entry 84 of List I of that Schedule and the State Legislature has no power to legislate on it by way of rule 42 of the Madras Distilleries, Rules, 1960 framed in exercise of the power conferred by sections 21 and 54 of the Madras Prohibition Act, 1937 and the levy made under that rule is invalid in law. The levy is neither duty nor countervailing duty. Rule 42 of the Madras Distillery Rules, 1960 is *ultra vires* of Article 265 of the Constitution of India. [*Paras.* 19 *and* 21.]

The levy of penalty under rule 42 for loss in transit in excess of the permissible limit of a sum practically equal to the price of the spirit sold is violative of Articles 19 (1) (*f*) and 19 (1) (*g*) of the Constitution in the circumstances of the instant case. [*Para.* 23.]

In the absence of proof that the rectified spirit lost in transit in excess of the permissible limit had been converted into liquor fit for human

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*W.P. Nos. 3377 and 5172 of 1975. *3rd April,* 1979.

consumption, and even if there was such proof levy of duty or penalty under rule 42 of the Madras Distillery Rules, 1960, which provides for the levy of duty at an abnormal rate is *ultra vires* the Madras Prohibition Act. [*Para.* 26.]

So far as rule 42 does not require the department to prove that the quantity which had not been received at the station of destination in excess of the permissible limit of 0.5 per cent, had gone into the open market by any act or omission on the part of the consignors it is illegal to the extent it authorises the levy of duty without proving any contumacious conduct of the distiller, exporter. [*Para.* 30]

In adopting the tariff rate as the rate of duty to be levied the State Legislature had abdicated its legislative power, and it is not a case of legislation by reference to another legislation. Rule 42 of the Madras Distillery Rules, 1960 in so far as it allows only 0.5 per cent. irrespective of the distance to which the rectified spirit is transported is unreasonable. [*Paras.* 33 to 35.]

The duty or penalty levied without issuing any notice to show cause against such penal action being taken is in violation of the principles of natural justice. [*Para.* 37.]

Cases referred to:—

Suneeta Laboratories v. *State of Madhya Pradesh*, (1972) Tax. L.R. 2058: (1972) Jab. L J. 3 0: (1972) M.P.L.J 565; *A. M. Sali Maricar* v. *Income-tax Officer*, (1973) 90 I T.R. 116: 86 L.W. 296: (1972) Tax. L.R. 1008; *Check Post Officer* v. *K. P. Abdulla & Bros*, (1971) 27 S.T.C. 1: (1971) Tax. L.R 4: (1971) 2 S C J. 342: (1971) 2 M.L J. (S.C.) 89: (1971) 2 An. W.R. (S.C.) 89: (1972) 2 S C.R. 817: A.I.R. 1971 S.C. 792; *K. P. Abdulla & Bros.*, v. *Check Post Officer*, (1968) 22 S.T.C. 552: (1969) L.W. (Crl) 80: (1969) 2 M.L.J. 144: I.L.R. (1969) 3 Mad. 484: A.I.R. 1970 Mad. 25; *M/s. Solar Works* v. *Employees, S. I. Corporation*, (1964) 2 M.L.J. 223: I.L.R. (1964) 1 Mad 906: 77 L W. 134: A.I R. 1964 Mad. 376; *Commissioner of Income-tax* v. *Anwar Ali*, (1970) 76 I.T.R. 596: (1971) 1 S C.J. 694: (1971) 1 I.T.J. 531: (1971) 1 S C.R. 446: A.I.R. 1970 S.C. 1782; *Lal Chand Gopal Das* v. *Commissioner of Income-tax*, (1963) 48 I.T.R. 324; *C. A. Abraham* v. *Income-tax Officer*, (1961) 1 An W.R. (S.C) 183: (1961) 1 S.C.J. 673: (1961) 1 M L.J. (S.C.) 183: 41 I.T.R. 425: A.I R. 1961 S.C. 609; *Commissioner of Income-tax* v. *Gokuldas Harivallabhadas*, I.L.R. (1958) Bom. 1162 1958 Bom. L.R. 960: 34 I.T.R. 98; A.I.R. 1959 Bom. 96; *Shama Rao* v. *Union Territory*, (1967) 2 I.T.J. 684: (1967) 2 An. W.R. (S.C.) 98: (1967) 2 M L.J. (S.C.) 98: (1967) 2 S.C.J. 749: A.I.R. 1967 S.C. 1480; *Delhi Municipality* v. *B. C. S & W. Mills*, (1969) 1 S.C.J. 621: (1968) 3 S.C.R. 251: A.I.R. 1968 S.C 1232. *Delhi Laws Act*, 1912, 1951 S.C.R. 747: 1951 S.C.J. 527: A.I.R. 1951 S.C. 332; *Abdul Quader & Co.*, v. *Sales-Tax Officer*. (1964) 2 M.L.J. (S.C.) 54: (1964) 2 An. W R. (S C.) 54: (1964) 2 S.C J. 229: (1964) M.L.J. (Crl.) 469: A.I.R. 1964 S.C. 922; *M/s. K. Babulal & Bros.* v. *K. C. Patel*, (1968) 1 S.C.J. 768: (1968) 1 S.C.R. 735: A.I.R. 1968 S.C 445; *Bengal Immunity Company Ltd.* v. *The State of Bihar*, (1955) 2 S.C.R. 603: (1955) 2 M.L.J. (S.C.) 163: 1955 S.C.J. 672 (1955) 6 S.T.C. 446: A.I.R. 1955 S.C. 661; *Ahmedabad Cotton Manufacturing Co., Ltd.*, v. *Union of India*, (1977) 18 Guj. L.R. 714: A.I.R. 1977 Guj. 113 *Union of India* v. *Tarachand Gupta & Bros.*, (1971) Tax. L.R. 706: (1971) 3 S.C.R. 557: A I.R. 1971 S.C. 1558; *Bhopal Sugar Industries* v. *Sales-Tax Officer*, (1964) 1 S.C.R. 488: A I R. 1967 S.C 549; *State of Uttar Pradesh* v. *Mohd Nooh*, 1958 S.C J. 242: 1958 S.C.R. 595: (1958) M.L.J. (Crl.) 197: A.I.R. 1958 S.C. 86; *Dana Nathu* v. *Sub-Divisional Magistrate*, (1973) 14 Guj. L.R. 209; *M/s. Baburam Prakash Chandra Maheswari* v. *Antarim Zila Parishad*, (1969) 1 S C.J. 878: (1969) 1 S.C.R. 518: A.I.R. 1969 S.C. 556; *Chhaganalal* v. *Assistant Custodian, Evacuee Property*, A.I.R. 1956 Sau. 47; *S. M. Transport* v. *Raman & Raman*, (1961) 2 M.L.J. 127: I.L.R (1961) Mad. 110: A.I.R. 1961 Mad. 180; *Rex* v *Richmond Confirming Authority* Ex parte *Howitt*, (1921) 1 K.B. 248; *Rex* v. *Groom* Ex parte *Cabbold*, (1901) 2 K.B. 157.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *certiorari*, (1) calling for the records relating to the communication bearing No. F 64/75, dated 2nd April, 1975, issued by the first respondent to the Trichy Distilleries and Chemicals Limited, Madras-34 and quash the same (W P. No. 3377 of 1975) and(2)calling for the records in Order No.F. 64 of 1975 dated 2nd April, 1975, of the first respondent herein and quash the same (W.P. No. 5172 of 1975).

S.K.L. Ratan and *Raju K. Lukace*, for Petitioner, in W.P. No. 3377 of 1975. *Mrs. Nalini Chidambaram*, for Respondent-Petitioner in W. P. No 5172 of 1975.

Chinnaswami for Government Pleader, for Respondents 1 and 2.

The Court delivered the following

JUDGMENT.—These Writ Petitions filed, under Article 226 of the Constitution of India are, for the issue of writs of *certiorari* of any other appropriate writs and orders calling for the records in Order No. F. 64 of 1975 dated 2nd April 1975, of the Distillery Officer, Tiruchirapalli, the first respondent and quashing the same.

2. Messrs. Trichy Distilleries and Chemicals Limited, Madras, the petitioners in W.P. No. 5172 of 1975 and third respondent in W.P. No. 3377 of 1975, hereinafter referred to as the Trichy Distilleries, are producers of Commercial Ethyl alcohol, also called as rectified spirit or industrial alcohol. Messrs. Sirsilk Limited, Kaghaznagar, Andhra Pradesh, the petitioners in W.P. No. 3377 of 1975 and third respondent in W.P. No. 5172 of 1975, hereinafter referred to as Sirsilk, are the importers of rectified spirit produced by Trichy Distilleries.

3. According to the affidavit of the Managing Director of Trichy Distilleries filed in support of W.P. No. 5172 of 1975, the Government of Tamil Nadu, the second respondent in both the Writ Petitions, issued orders in Memo No. 1954/IF/74-1, dated 12th November, 1974, Industries and Commerce Department, to release rectified spirit from the several distilleries, including the Trichy Distilleries in Tamil Nadu. The quantity to be supplied by the Trichy Distilleries was 16 lakh litres and the Trichy Distilleries were asked by another Memo. No. 1954/IB/74-B, dated 12th November, 1974, to supply 15,35,000 litres of rectified spirit to Sirsilk. Sirsilk obtained the necessary import and export permits from the concerned authorities. The Trichy Distilleries obtained the necessary export permit for exporting 3,00,000 bulk litres of rectified spirit to Sirsilk. The price fixed for supply of 3,00,000 litres of rectified spirit was 86 paise per bulk litre ex-distillery. The excise duty and gallonage fee were 50 and 25 paise respectively per litre and the Central Sales Tax payable was 3 per cent. It was agreed between the Trichy Distilleries and Sirsilk that the latter shall accept the quantity and quality of the rectified spirit, as recorded by the Excise Officer of the former, as final in respect of each consignment, that the responsibility of the former shall cease as soon as the product is loaded to the tanker wagons, that any losses in transit over and above 0.5 per cent. fixed by the Government of Tamil Nadu, the second respondent, shall be to the account of Sirsilk and that any excise duty or other penalty leviable by the second respondent shall be borne by Sirsilk and it should indemnify Trichy Distilleries against all such penalties. Two consignments of rectified spirit of 1,50,000 litres each were despatched through railway wagons on 14th December, 1974, and 19th December, 1974, by the Trichy Distilleries from their Distillery to Sirsilk and they were received at the destination on four days, namely, 29th December, 1974, to 1st January, 1975, after the wagons, had been exposed to sun's heat for 12 to 16 days with consequent loss due to evaporation. When the verification certificate was received from Sirsilk, it was found that there was a transit loss in excess of the limit permitted under rule 42 of the Tamil Nadu Distillery Rules, 1960, in all the consignments The verification certificates were forwarded to the first respondent's Distillery Officer. The first respondent thereafter served on the Trichy Distilleries a demand notice calling for payment of 5 00,990.80 as duty at the tariff rate for excess transit wastage of rectified spirit within 7 days of the receipt thereof. The contention of the Trichy Distilleries was that the demand was liable to be quashed for the following reasons:

1. The State Legislature has no power to legislate on rectified spirits.

2. Rule 42 of the Tamil Nadu Distillery Rules, 1960 is *ultra vires* of the Constitution of India. Even if the State Legislature has power to legislate on rectified spirits, under Entry 51, List II of the Seventh Schedule to the Constitution of India, the State Government can levy only excise duty or countervailing duty and not duty at the tariff rate.

3. Even if the State Government can levy duty on rectified spirit, it cannot be confiscatory in nature. Rule 42 is violative of Article 19 (1) (*f*) and (*g*) of the Constitution of India.

4. Rule 42 of the Tamil Nadu Distillery Rules, 1960, is *ultra vires* of the Prohibition Act of 1937.

5. If the duty is construed as a penalty' Rule 42 is illegal, in so far as it does not require the first respondent, while levying penalty, to prove the contumacious conduct of the distiller but throws the burden on the distiller to prove his innocence.

6. By adopting the tariff rate as the rate of the duty to be levied, the State Legislatur

has become guilty of abdicating its legislative power.

7. Rule 42 of the Tamil Nadu Distillery Rules, 1960, is unreasonable in so far as it allows wastage only at 0.5 per cent. whatever the distance to which the rectified spirit is transported from the Distillery.

8. Rule 42 will be attracted only when the transport is by the distiller and the alleged penalty can be levied only against the person committing the offence.

9. It is reasonable to assume that rule 42 of the Tamil Nadu Distillery Rules, 1960, has been framed by inadvertence or misconception.

10. The order of the second respondent is illegal in so far as no opportunity was given to the Trichy Distilleries before levying duty at the tariff rate.

4. In the affidavit of the representative of Sirsilk filed in support of W.P. No. 3377 of 1975, it is alleged that Sirsilk manufactures synthetic fabric for which rectified spirit is one of the raw materials. Sirsilk obtained import permit from the Government of Andhra Pradesh for the import of 3 lakh litres of rectified spirit from Trichy Distilleries, which had obtained the corresponding export permit from the Government of Tamil Nadu. Sirsilk paid to Trichy Distilleries a sum of Rs. 5,57,490 for the value of 3 lakh litres of rectified spirit, railway freight and tax. The permit issued to Trichy Distilleries by the Government of Tamil Nadu was subject to the condition that the rectified spirit should be moved only in railway wagons. The rectified spirit was accordingly consigned to Sirsilk in Railway tanker wagons to its factory at Kaghaznagar in Andhra Pradesh. At the destination, the Excise Inspector examined the consignment and certified that there was a wastage of 7,590.77 proof litres of rectified spirit over and above the permissible limit of 0.5 per cent. in all the 12 consignments. The Trichy Distilleries had executed a bond for Rs. 1,00,000 in favour of the President of India undertaking to pay duty at the tariff rate on all losses in transit by leakage and evaporation in excess of 0.5 per cent. Sirsilk being only purchasers from Trichy Distilleries, the liability under the bond cannot in any event be transferred to Sirsilk. The Railway Authorities have issued Certificate Nos. 007753 to 007755 dated 2th January, 1975 in respect of these three consignments to the effect that though the three tanker wagons were with the seals intact, the contents were found leaking through the bottom valves. The shortage was thus due to leaky valves of the tanker wagons and not to any act of commission or omission on the part of Sirsilk. Those verification certifications were forwarded to Trichy Distilleries on 13th March, 1975. The Distillery Officer, the first respondent had demanded a sum of Rs. 5,00,990.80 from the Trichy Distilleries by letter No. F. 64 of 1975 dated 2nd April, 1975 on the basis of the aforesaid bond. The Trichy Distilleries sent a copy of the demand to Sirsilk on 9th April, 1975 seeking to transfer that liability on Sirsilk, taking advantage of a counter indemnity furnished by Sirsilk to them. A sum of Rs. 2,82,382 pre-paid by Sirsilk to Trichy Distilleries for further supplies is held in deposit by Trichy Distilleries and they are refusing to make further supplies on the ground that the Distillery Officer was not permitting them to supply the balance unless the demand made by him is satisfied by them. Sirsilk is, therefore, vitally interested in the demand made by the Distillery Officer on the Trichy Distilleries. Sirsilk contends that the demand is illegal, *ultra vires*, and liable to be struck down for the following reasons:

"(1) Section 18-A of the Madras Prohibition Act, 1937, enables the State Government to levy excise duty by notification, from time to time on all liquors (*a*) imported, (*b*) exported, (*c*) transported, (*d*) manufactured, and (*e*) issued from a manufactory in one or more of the ways prescribed under the rules made under that Act. Though there is a right to levy duty on the transport of excisable commodity, there is no right for the State to levy duty on the leakage of the commodity in transit. No bond can be relied upon for claiming such a levy.

(2) What is authorised by rule 42 of the Tamil Nadu Distillery Rules, 1960, is nothing but penalty. Rule 42 is, therefore, *ultra vires*.

(3) The duty demanded at the tariff rate is illegal and confiscatory in nature. The duty at the tariff rate is Rs. 66 per litre, while the price of the commodity is 89 paise per bulk litre. Rule 42, which empowers the authorities to levy such a penal rate of duty is highly arbitrary and liable to be struck down as illegal.

(4) The intention and purpose of the Madras Prohibition Act, 1937, is to prohibit production, manufacture, possession, export, import, transport, purchase, sale and consumption of intoxicating liquors. The levy of duty at penal rate on wastage in transit is inconsistent with the intention and purpose of the Madras Prohibition Act and, therefore, rule 42 providing for a levy of duty in the nature of penalty is *ultra vires* of the rule-making power.

(5) Rule 42 of the Distillery Rules, 1960 is destructive of the provisions of the Madras Prohibition Act inasmuch as it impose penal duty on goods lost in transit.

(6) Under rule 38, execution of a bond is necessary only in cases where duty is not paid. But in the instant case duty has already been paid by Trichy Distilleries. Trichy Distilleries should not, therefore, have been called upon to execute the bond.

(7) Rule 42 is *ultra vires* the Constitution and goes beyond the rule making power inasmuch as it empowered the authorities to collect the penal duty without first determining the liability to duty.

(8) Normally, penalty, is levied only in cases where there is escapement from assessment to duty in the present case and, therefore, no duty could be levied on the goods lost in transit.

5. The second respondent has filed a common counter-affidavit in both the writ petitions contending that the Trichy Distilleries were allowed to export 3 lakh bulk litres of rectified spirit to Sirsilk by the Board's reference dated 11th December, 1974. Trichy Distilleries despatched the first consignment of six wagons carrying 1,50,000 litres on 14th December, 1974 and the second consignment of six wagons carrying a similar quantity on 19th December, 1974. The Distillery Officer had obtained an indemnity bond for a sum of Rs. 1,00 000 from the Trichy Distilleries for paying duty at the tariff rate on the excess loss in transit. It was reported that three wagons carrying 25,000 litres each were found to be leaky on arrival. There was no excess loss in transit in respect of the remaining nine wagons. The excess transit loss was worked out as 7,590.77 bulk litres out of a total loss of 10,082.27 bulk litres and the tariff rate was applied on the excess wastage of 7,590.77 bulk litres.

6. The Trichy Distilleries have undertaken in the application for the grant of licence to abide by the conditions of the licence as well as by the Tamil Nadu Prohibition Act, 1937, and the rules and regulations made thereunder. The licence granted to them contains provisions for the licensee being bound by the Tamil Nadu Prohibition Act, 1937, and the notifications, rules and orders made thereunder, and also the Madras Distillery Rules, 1960, and to observe such rules as may be prescribed by the State Government and such instructions and orders as may be issued by the Commissioner from time to time in regard to the control of the manufacture, possession and sale or issue of rectified spirit and denatured spirit. Under Rule 36 of the Distillery rules rectified spirit can be removed only under bond for export to any other State specially permitted by the Commissioner. Under Rule 37, when spirits are removed on concessional rates of duty, the distiller is bound to execute a bond for payment of duty at the tariff rate less the amount of duty, if any, already paid, in case he failed to account for the commodity. The export in the present case was to Andhra Pradesh and at the concessional rate of duty. According to Rule 42 of the Distillery Rules, loss in transit by leakage and evaporation shall not exceed 0.5 per cent. The Distillery Officer took proper action with reference to the mandatory provisions of the Distillery Rules.

7. The rules do not provide for any accountability or liability on the part of the purchaser of rectified spirit. The contention of Trichy Distilleries that any loss in transit is not the concern of the State of Tamil Nadu on the ground that it has not suffered any loss of revenue, is untenable in the background of the total prohibition introduced in the State of Tamil Nadu. It is not so much the loss of money, but it is the un-accounted loss of alcohol which is the primary concern in the present case. It has not been alleged nor is it possible to ascertain that the excess loss occurred only in Andhra Pradesh and not in Tamil Nadu. The very large unaccounted loss of 10,082.27 bulk litres is too serious a matter about which no lenient view could be taken. Therefore, the penalty imposed was proper and in accordance with the Rules.

8. The contention of Trichy Distilleries that under rule 35 of the Distillery Rules export to other States in the Indian Union should

have been permitted without payment of duty under bond and that when rectified spirit is exported the State Government has no autho rity to levy any fee or duty is untenable. So far as export is concerned, rule 35 (*a*) (1) (*ii*) alone will apply. Sub-rule (1) relates to transport or export to another distillery or bonded manufactory, while sub-rules (2) and (3) refer to supp ies to licensees, officers and institutions of Government. Sub-rule (*ii*) of rule 35 (*a*) (1) alone applies to export specially permitted by the Commissioner and it is necessarily to be covered by a bond and the bond was, therefore, taken from the distilleries in the present case. Under rule 37, the distiller shall execute a bond when spirits are removed from the distilleries without payment of duty or on payment of duty at concessional rates.

9. The contention of Trichy Distilleries that rectified spirit is not liquor for human consumption and that the State Government cannot levy excise duty with reference to Entry 84 under List I is baseless and devoid of merits.

10. The tariff rate is based on proper enquiries made by competent authorities and revised from time to time in accordance with the provisions of the Indian Tariff Act. There is no abdication of the legislative powers by adopting the rate which is properly applicable and relevant.

11. A State which foregoes a large amount of revenue in implementing prohibition for giving effect to directive principles has necessarily to adopt strict standards on unaccounted losses. It is neither alleged nor proved that the excess loss in transit has occurred only outside the limits of Tamil Nadu The Distillery Officer has, therefore, acted in accordance with the rules. The Trichy Distilleries and Sirsilk are not entitled to any relief.

12. M/s. Trichy Distilleries are manufacturers of Ethyl Alcohol which is also called "rectified spirit" or "Industrial Alcohol" and will hereinafter be referred to as "rectified spirit". The Sirsilk limited are importers of rectified spirit manufactured by Trichy Distilleries. Trichy Distilleries obtained an export permit from the Government of Tamil Nadu for exporting 3 lakhs litres of rectified spirit to Sirsilk which obtained the necessary import permit from the Government of Andhra Pradesh. There is no dispute that the price fixed for the supply of 3 lakhs litres of rectified spirit was 86 paise per litres, that the excise duty and gallonage fee payable were 50 paise and 25 paise respectively per litre and that the Central Sales Tax payable was 3 per cent.

13. Rule 35 of the Madras Distillery Rules, 1960, which provides for removal of spirits from distillery reads thus:

"(*a*) Rectified spirit shall be removed—

(1) under bond;

(*i*) for transport or export to another distillery or to a bonded manufactory established under the medicinal and Toilet Preparations (Excise Duties) Rules, 1966, within the State for the manufacture of medicinal or toilet preparations or to the licensed premises of a licensee for the manufacture in bulk of culinary, aerated waters and other flavouring essences, extracts and colouring, and

(*ii*) for export to any other State in the Indian Union when specially permitted by the Commissioner;

(2) On payment of the prescribed fee and duty if sold to licensees in the State or to any person or institution specially authorised to receive supply from the distillery; and

(3) without bond and without payment of any fee or duty if sold to prescribed officers and institutions of the State or Central Government and without duty if sold to officers and institutions who are specifically exempted from payment of duty alone.

(*b*)......................"

14. Rule 38 provides for the removals under bond and reads thus:

"*Removals under bond*—When spirits are removed from a distillery without payment of duty, the distiller shall execute a bond for the payment of duty on them at the tariff rate in case of his failure to account for them to the satisfaction of the Collector."

Rule 42 provides for allowance for wastage in transit, and reads:—

(*a*) Transport of rectified spirits shall only be in metallic receptacles. The use of wooden receptacles is prohibited. Loss in transit by leakage and evaporation shall not exceed one half of one per cent, The allowance to

be made under this rule shall be determined by deducting from the quantity of spirits despatched from the distillery, the quantity received at the place of distination, both quantities being stated in terms of London proof gallons and shall be calculated on the quantity consigned in each receptacle comprised in a consignment. If the report of the officer by whom a consignment of spirits transported or exported under bond or duty free has been gauged and proved on arrival at its destination shows that loss has occurred in transit to a greater extent that that prescribed, the distiller shall pay duty at the tariff rate, on so much of the deficiency as is in excess of the allowance so prescribed:

Provided that, if it is proved to the satisfaction of the Commissioner that such deficiency could have been prevented by the exercise of proper care and precaution and that the spirits could not have passed into consumption the duty levied on such deficiency shall be refunded.

(*b*) Any wastage of denatured spirit in transit, that is not properly accounted for shall be charged with gallonage fee together with such penalty not exceeding the gallonage fee leviable thereon as the Commissioner may deem fit.

(*c*) The Commissioner's decision on any question arising under the rule shall be final".

15. The Trichy Distilleries executed the bond as required by Rule 33. It was agreed between Trichy Distilleries and Sirsilk that the latter shall accept the quantity and quality of the rectified spirit, as recorded by the Excise Officer of the former, as final in respect of each consignment, that the responsibility of the former shall cease as soon as the product is loaded into tanker wagons, that any loss in transit over and above 0.5 per cent. fixed by the Government of Tamil Nadu shall be to the account of Sirsilk and that any excise duty or other penalty leviable by the second respondent, shall be borne by Sirsilk and it should indemnify Trichy Distilleries against all such penalties. Subsequently two consignments of rectified spirit of 1,50,000 litres each were despatched through railway wagons on 14th December, 1974 and 19th December, 1974 from their Distillery to Sirsilk and they were received at the destination on four days, namely 29th December, 1974 to 1st January, 1975. According to Trichy Distilleries, the Railway authorities at the station of destination, had issued certificates in respect of three wagons to the effect that though the tanker wagons were received with the seals intact, the contents were found leaking through the bottom valves. It is the admitted case that Trichy Distilleries had executed an indemnity bond for a sum of Rs. 1,00 000 as directed by the Distillery Officer for paying the duty at the tariff rate on the excess loss in transit. It has also been admitted in the counter affidavit of the second respondent that it was reported that three wagons each with 25,000 litres were found to be leaking on arrival that there was no excess loss in transit in respect of the remaining nine wagons, that the excess loss in transit, in respect of three wagons, was worked out as 7590.77 bulk litres and that the tariff rate was applied on that excess wastage of 7590.77 bulk litres.

16. The first respondent thereafter served on Trichy Distilleries a demand notice F No. 64/75 dated 2nd April, 1975 calling for payment of Rs. 5,00,990.80 towards the duty at the tariff rate for the excess transit wastage of rectified spirit within seven days of the receipt thereof. Sirsilk had paid to Trichy Distilleries a sum of Rs 5,57,490 for the value of 3 lakh litres of rectified spirit, railway freight and tax. In view of the counter indemnity bond executed by Sirsilk in favour of Trichy Distilleries, the latter sent a copy of the said demand for Rs. 5,00,990.80 made by the Distillery Officer on Trichy Distilleries to Sirsilk. Sirsilk had pre-paid a sum of Rs. 2,82,382 to Trichy Distilleries for further supplies. It is the case of Sirsilk that Trichy Distilleries are holding that amount and refusing to make further supplies on the ground that the Distillery Officer was not permitting them to supply the balance unless the demand for the payment of the sum of Rs. 5,00,990.80 is satisfied. There is no dispute between the parties regarding the facts mentioned above. It is in these circumstances that Trichy Distilleries have filed Writ Petition No.5172 of 1975 for the issue of a writ of *certiorari* or any other appropriate writ calling for the records in Order No.F.64/75 dated 2nd April, 1975, of the first respondent and quashing the same, and the Sirsilk have filled Writ Petition No. 3377 of 1975, as the person aggrieved, for the issue of a writ of *certiorari* quashing the same order dated 2nd April, 1975 of the first respondent.

17. The contentions of the parties have been set out above. Though several grounds have been mentioned in the affidavit filed in support of Writ Petition No.5172 of 1975, only nine grounds were urged before me by Mrs. Nalini Chidambaram, learned counsel for the Trichy Distilleries. The first ground is that the State Legislature has no power to legislate on rectified spirits. Article 265 of the Constitution of India lays down that no tax shall be levied or collected except by authority of law. Rule 42 (*a*) extracted above casts a liability on the person, transporting rectified spirits, to pay duty at the tariff rate, on so much of the deficiency as is in excess of the allowance prescribed namely 0.5 per cent.

> "Government thinks it expedient to do so. The objects to be taxed so long as they appento be within the legislative competence of the Legislature can be taxed by the Legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied by the taxing statute the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the Legislature, and in dealing with the contention raised by a citizen that the taxing statute contravenes Article 19 Courts would naturally be circumspect and cautions. Where for instance it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the Legislature for achieving its confiscatory purposes."

Government's power to levy duties of excise reads thus:

> "Duties of excise on tobacco and other goods manufactured or produced in India except—
>
> (*a*) alcoholic liquors for human consumption;
>
> (*b*) Opium, Indian hemp and other narcotic drugs and narcotics,
>
> but including medicinal and toilet preparations containing alcohol or any substances included in sub-paragraph (*b*) of this entry.

18. The learned counsel for the petitioner in W.P. No. 5172 of 1975 submitted that rectified spirit is nor alcoholic liquor for human consumption and that the State Legislature cannot therefore legislate in regard to that Commodity. The learned counsel further submitted that on a combined reading of entry 51 in List II and entry 84 of List I, it will be clear that the State Legislature can legislate only in respect of (*a*) alcoholic liquors for human consumption, and (*b*) Opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of entry 51, and that the Government of India can legislate on tobacco and other goods manufactured or produced in India except (*a*) alcoholic liquors for human consumption and (*b*) Opium, Indian hemp and other narcotic drugs and narcotics. But including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of entry 84. It was submitted that rectified spirit is not alcoholic liquor for human consumption and that therefore the State Government cannot legislate in regard to that commodity by way rule 42 of the Distillery Rules, 1960 which has been framed in exercise of the power conferred by sections 21 and 54 of the Madras Prohibition Act, 1937. In support of the contention that rectified spirit is not alcoholic liquor for human consumption and that therefore the State Legislature cannot legislate on it, the, learned counsel for Trichy Distilleries relied upon the judgment of the Allahabad High Court in S.A. No. 177 of 1970 dated 29th March, 1973. The question for consideration before the division Bench of the Allahabad High Court in that case was whether excise duty could be levied on rectified spirit under the Uttar Pradesh Excise Act, 1910. The learned Judges have observed in their judgment in that case that rectified spirit is not to be made available to the common man for human consumption, that the mere fact that some misguided persons, after obtaining rectified spirit surreptitiously drink it after diluting it with water, will not alter the fact that rectified spirit is not an article meant for human consumption and that the capability of conversion into alcoholic liquor for human consumption will not make the rectified spirit itself an alcoholic liquor for human consumption, and before conversion it cannot be said to be an alcoholic liquor for human consumption. The learned Judges have held, following the decision of the Division Bench of the Madhya

Pradesh High Court in *Suneeta Laboratories* v. *State of Madhya Pradesh*[1], that the State Legislature has no right to impose any excise duty on rectified spirit. The Supreme Court in S.L P. (Civil) No. 287 of 1975, has, by order dated 27th February, 1975 declined to grant special leave to file an appeal against the said decision of the Allahabad High Court in S.A.No. 177 of 1970.

19. The learned Advocate-General did not advance any argument specifically regarding this ground. But he submitted in the course of his argument relating to ground number four that rectified spirit can be converted into liquor fit for human consumption. As stated earlier that submission has been found to be not acceptable by the Division Bench of the Allahabad High Court in the above said S.A.No. 177 of 1970. In these circumstances I agree with the learned counsel for Trichy Distilleries that rectified spirit is not alcoholic liquor for human consumption falling within entry 51 of List II in Schedule VII of the Constitution of India and that it falls within entry 84 of List I of that Schedule and that the State Legislature has no power to legislate on it by way of rule 42 of the Madras Distilleries Rules, 1960, framed in exercise of the power conferred by sections 21 and 54 of the Madras Prohibition Act, 1937. I find accordingly and hold that the levy made under rule 42 is invalid in law.

20. The second ground urged by the learned Counsel for the petitioner in W.P. No. 5172 of 1975 is that rule 42 of Tamil Nadu Distillery Rules, 1960 is *ultra vires* of Article 265 of the Constitution of India which lays down, as already stated, that no tax shall be levied or collected except by authority of law. It was submitted that even if duty can be levied under Entry 51 of List II of Schedule VII of the Constitution of India, only excise duty and countervailing duty can be levied and not any penalty on the loss or wastage in transit in excess of the permissible limit of 0.5 per cent.

21. Rule 54 (2) (*a*) of the Prohibition Act, 1937 enables rules to be framed for the issue of licences and permits and the enforcement of the conditions thereof. Rule 54 (2) (*bb*) enables rules to be framed prescribing the way in which the duty under section 18-A of that Act may be levied. As already stated, rule 42 of the Madras Distillery Rules, 1960, has been framed in exercise of the powers conferred by sections 21 and 54 of the Prohibition Act, 1937. It was submitted by the learned counsel for Trichy Distilleries that the levy on the excess loss in transit is neither excise duty nor countervaling duty and that therefore rule 42 is *ultra vires* of Article 265 of the Constitution of India. Though, as stated earlier in paragraph 5 of the common counteraffidavit, it has been contended that the penalty imposed is proper and in accordance with the Rules, what has been levied is only duty under rule 42 (*a*) of the Madras Distillery Rules, 1960. It has been levied not on any goods manufactured or produced in the States, but only on the loss of such goods in transit in excess of the permissible limit of 0.5 per cent. in respect of goods which has already been subjected to duty. Therefore I agree with the learned counsel for Trichy Distilleries that the levy is neither duty nor countervailing duty and that rule 42 of the Madras Distillery Rules, 1960 is *ultra vires* of Articles 265 of the Constitution of India. It may be stated here that no argument was advanced specifically with regard to ground number two by the learned Advocate-General.

22. The third ground urged before me by the learned counsel for Trichy Distilleries is that the levy under rule 42 of Madras Distillery Rules, 1960, is confiscatory in nature and violative of Articles 19 (1) (*f*) and 19 (1) (*g*) of the Constitution of India. Article 19 (1) (*g*) lays down that all citizens shall have the right to acquire, hold and dispose of property Article 19 (1) (*g*) lays down that all citizens shall have the right to practise any profession or to carry on any occupation, trade or business. The learned counsel for Trichy Distilleries submitted that the price of three bulk litres of rectified spirit exported by Trichy Distilleries to Sirsilk, inclusive of excise duty etc., comes to Rs. 5,57,490 and that the penalty levied in respect of the excess loss of 7590 77 bulk litres is Rs. 5,00,990.80, and Trichy Distilleries cannot pay this amount except by disposing of their property and therefore Article 19 (1) (*f*) of the Constitution of India is offended. It was also submitted for Trichy Distilleries that if the demand like the one made in the present case is to be complied with, that concern cannot carry on its trade and therefore Article 19 (1) (*g*) of the Constitution of India is offended. In this connection reliance

1. (1972) Jab.L.J. 360: (1972) M.P.L.J. 565: (1972) Tax.L.R. 2058.

was placed by the learned counsel for Trichy Distilleries on the decision of a Division Bench of this Court in *A.M. Sali Maricar* v. *Income-tax Officer, Nagapattinam*[1] wherein at page 126, the learned Judges have observed that "the provision for confiscation of property for non-payment of tax arrears could not be sustained as a provision ancillary or incidental for enforcement of payment and therefore, a reasonable restriction under clause (5) of Article 19 of the Constitution and that even as a punishment for failure to pay the tax within time, the legislation could not be sustained from the attack of Article 19 (1) (*f*). The learned Judges have further observed:

> "The learned counsel for the revenue sought to sustain section 140-A (3) of the Act (Income-tax Act, 1961) on the ground that is a provision enabling coercive process for enforcement or effectuating the recovery of the tax. We are unable to see how this provision could be considered to be a provision for enforcement or recovery of the tax payable. The provision has no rational or intelligent connection with the recovery of the tax itself. Actually the tax itself does not provide for the issue of a demand notice under section 156 of the Act. If it is intended to be a coercive process, it must be to recover the debt itself but not to enhance it. The provision, far from enabling to recover the debt imposes an additional burden It would be a contradiction to say "you are trying to enforce and recover by imposing additional or new debt". Far from effectuating recover, the levy of penalty may even frustrate the very object. How could an additional burden help a person who is not able to pay?"

In another part of that judgment, the learned Judges have observed that "evry citizen is entitled to retain his income ascertained after deduction of the taxes payable under the Income-tax Act " ....." In *Check Post Officer* v. *K.P. Abdulla and Brothers*.[2] the Suprme Court held that section 42 (3) of the Tamil Nadu General Sales Tax Act, 1959, which empowers the Check Post Officers to confiscate goods and levy penalty in lieu of confiscation without inspection of the goods found in a vehicle when the driver of the vehicle was not carrying with him the documents specified in the section, is not a provision which is ancillary or incidental to the power to tax sale of goods under Entry 54 of List II of the Seventh Schedule to the Constitution, approving the decision of this Court in *K.P. Abdulla and Brother* v. *Check Post Offices*[1] .... Though the Supreme Court was concerned with the legislative competency of a State Legislature under Entry 54 of List II of the seventh Schedule to the Constitution the ratio of that judgment, in our opinion, is that a provision for confiscation or levy of penalty is not a provision for enforcement of payment of tax. Thus the provision for confiscation of property for non-payment of tax arrears could not be sustained as a provision ancillary or incidental for enforcement of payment and, therefore, a reasonable restriction under clause (5) of Article 19 of the Constitution. Even as a punishment for failure to pay the tax within time, the legislation could not be sustained from the attack of Article 19 (1) (*f*)."

23. There is considerable weight in the argument of the learned counsel for Trichy Distilleries that the duty of Rs. 5 00,990.80 levied on the excess loss in transit could not be paid by Trichy Distilleries except by disposing of their properties to the extent necessary for the complying with the demand and therefore Article 19 (1) (*f*) of the Constitution of India is offended, that if the demands, like the present one, are to be complied with, persons like Trichy Distilleries cannot carry on their business and that therefore the right guaranteed to a citizen under Article 19 (1) (*g*) of the Constitution of India is offended. I find accordingly. It may be stated here that the learned Advocate-General did not advance argument on this ground.

24 The fourth ground urged by the learned counsel for Trichy Distilleries is that rule 42 of the Madras Distillery Rules, 1960, is *ultra vires* of the Madras Prohibition Act, 1937. The contention of respondents 1 and 2 in paragraph 5 of their common counter-affidavit is, as already stated, that the penalty

1. (1973) 90 I.T.R. 116: 86 L.W. 296: (1973) Tax. L.R. 1008.
2. (1971 27 S.T.C. 1 (S.C.): (1971) Tax. L.R. 4: (1971) 2 S.C.J. 342: 1971 2 M.L.J. (S.C.) 8 : (1971) 2 An. W.R. (S.C.) 89: (1971) 2 S.C.R. 817: A.I.R. 1971 S.C. 792.

1. (1968 22 S.T.C. 552 (Mad.): (1969) L.W. (Crl.) 80: (1969) 2 M.L.J. 144: I.L.R. (1969) 3 Mad. 384: A.I.R. 1970 Mad. 25.

imposed, is in accordance with the Rules in view of the introduction of total prohibition in Tamil Nadu. Section 5 of the Madras Prohibition Act, 1937 provides for punishment to any person who renders or attempts to render fit for human consumption any spirit, whether manufactured in India or not, which has been denatured or any preparation containing such spirit, or has in his possession, any spirit or preparation containing spirit in respect of which he knows or has reason to believe that any attempt has been made. This section provides for minimum punishment to the extent of imprisonment for six months and a fine of seven hundred and fifty rupees for a first offence: imprisonment for nine months and a fine of one thousand rupees for a second offences, and imprisonment for one year and a fine of one thousand five hundred rupees for a third and subsequent offences.

25. The learned counsel for Trichy Distilleries submitted that even if the quantity of rectified spirit, found to have been lost in transit in excess of the permissible limit of 0 5 per cent. had been converted into alcoholic liquor for human consumption, for which there is no proof, penalty cannot be levied at the abnormal rate as has been done in the present case by the subordinate legislation in the form of Rule 42 of the Madras Distillery Rules, 1960. It was further submitted that the levy of such a high penalty is not authorised by the Madras Distillery Rules, 1960 and is *ultra vires* of the provisions of that Act. Reliance is placed, in this connection, on the decision of a Bench of this Court in *M/s. Solar Works* v. *Employees' S.I. Corporation.*[1] In that case an application was filed under section 75 (2) of the Employees' State Insurance Act, 1948, by the Employees' State Insurance Corporation to recover contribution due from the employer, namely, the Solar Works before the Employees' Insurance Court for the period between March, 1957 to November, 1958, on 21st June, 1959. The Act does not prescribe any period of limitation within which such an application could be filed. But Rule 17 of the rules framed by the Madras State Government prescribed a period of 12 months from the date on which the cause of action arose or the claim became due. There is a proviso to the effect that the Court may entertain an application after the said period of 12 months, if it is satisfied that the applicant had sufficient reason for not making the application within the said period. The Employees' State Insurance Corporation invoked the benefit of that proviso in that application stating that the Corporation became aware of the liability of the employer only on 16th February, 1959, when the Insurance Inspector inspected the records of the employer. The employer opposed the claim as being barred by limitation and urged that no satisfactory reason had been adduced for excusing the delay.

26. Dealing with the question whether rule 17 is valid or *ultra vires* the learned Judges have observed in their judgment that "where an Act itself does not provide for limitation with reference to a particular matter and the delegation of power to make rules is conferred by a section of the Act which does not, expressly or impliedly, relate to the power to prescribe time, the authority to which the power is delegated, namely the State in this case, cannot make a rule prescribing limitation. This is because, even under the Constitution Article 145 (1) (*c*), where the Supreme Court is authorised to make rules for the practice and procedure of the Court, there is specific reference to a power to prescribe limitation for applications to Court. As the learned Advocate General rightly stresses, in the Government of India Act, 1935, List 3, Entry 4, the power to prescribe limitation was included as part of the Civil Procedure, but a significant departure appears in List 3, Entry 13 of the 7th Schedule to the Constitution where the power to prescribe limitation has been segregated". The learned Advocate General was also at pains to furnish us with a table of Central and State Acts, all the particulars of which need not be reproduced here, which definitely proves that, where the rule making power is conferred by a section of the Act, and it is contemplated that the rule-making authority might also prescribe limitation, there is a specific reference to the power to prescribe time, in some form or another, in the section concerned. It is sufficient for us to point out that there is an impressive list of the Central Acts exhibiting this uniform feature, as well as at least ten or more Madras Acts, also having the same characteristic.

"When we turn to the matter actually in issue before us, we find further difficulties in adopting the view that the rule-making power generally conferred in the present

1. (1964) 2 M.L.J. 223: I.L.R. (1964) 1 Mad. 906: 77 L.W. 134: A.I.R. 1964 Mad. 376.

case under section 96 (*b*) namely, the power to make rules with regard to "the procedure to be followed in proceedings before such Courts and the execution of orders made by such Courts" will, by necessary implication, include the power to prescribe limitation .....Hence we agree with Venkataraman, J., that Rule 17, as it stands, is *ultra vires* of the rule-making power of the State, and that, in the present case, the application by the Employees of the State Insurance Corporation is not time-barred in any sense, and needs no condonation". Rule 42 of the Madras Distillery Rules provides for the levy of duty on the excess loss in transit and is not in consonance with section 5 of the Madras Prohibition Act, 1937. The learned Advocate-General invited my attention to the preamble to the Madras Prohibition Act which reads thus": Whereas it is expedient as early as possible.

to bring about the prohibition except for medicinal, scientific, industrial or such like purposes, of the production, manufacture, possession, export, import, transport, purchase, sale, and consumption of intoxicating liquors and drugs in the Province of Madras;

And whereas it is desirable to give effect to the above-mentioned policy by introducing it in certain selected areas in the said Province and utilizing the experience gained therein for extending it to the other areas thereof;

It is hereby enacted as follows:—

The learned Advocate-General submitted that section 54 of the Madras Prohibition Act empowers the State Government to make rules for the purpose of carrying into effect the provisions of the Act and that section 54 (2) (*bb*) empowers the State Government to prescribe the ways in which the duty under section 18-A may be levied. While conceding that rectified spirit as such, is not fit for human consumption, the learned Advocate-General submitted that it can be converted into liquor fit for human consumption and that the excess wastage could have gone into the market in bottles, and the proviso to rule 42 enables the distiller to satisfy the department that the excess loss was caused by some reason for which he was not responsible and the distiller could have taken advantage of the proviso and could have explained and avoided the writ petition. Though the argument of the learned Advocate-General proceeds on the basis that rectified spirit could be converted into liquor fit for human consumption, it has been found above that rectified spirit, as such, is not liquor fit for human consumption. As rightly submitted by the learned counsel for Trichy Distilleries, there is no proof that the rectified spirit lost in transit in excess of the permissible limit, has been converted into liquor fit for human consumption, and even if there is any such proof, levy of duty or penalty under rule 42 of the Madras Distillery Rules, 1960 which provides for the levy of duty at an abnormal rate in *ultra vires* of the Madras Prohibition Act. I find accordingly.

27. As stated earlier in paragraph 5 of the common counter affidavit, respondents 1 and 2 have contended that penalty has been levied in accordance with the rules The fifth ground urged by the learned counsel for Trichy Distilleries is that even if the duty is construed as a penalty, rule 42 is illegal in so far as it does not require the department while levying the penalty to prove any constumacious conduct of the distiller but throws the burden on the distiller to prove his innocence. It was submitted that before levying penalty, respondents 1 and 2 should prove that the rectified spirit lost in transit in excess of the permissible limit has illegally gone into human consumption. It was argued that the levy has been made on mere surmise and is illegal.

28. The contention of Sirsilk in the affidavi filed in support of their Writ Petition No. 3377 of 1975 is that the excess loss in transit had occurred in respect of three consignments in which though the tanker wagons arrived at the station of destination with the seals intact, the contents were found leaking through the bottom valves. Even in the counter-affidavit of the second respondent, it is stated that it was reported that three wagons carrying 25,000 litres each were found to be leaking on arrival, that in respect of the remaining nine wagons no loss in excess transit loss was worked out as 7590.77 bulk litres out of the total wastage of 10,082.27 bulk litres, and the tariff rate was applied only on the excess wastage of 7590.77 bulk litres. Thus, it is common ground that the excess loss has occurred as a result of three tanker wagons leaking through the bottom volves, though those three wagons carrying 25,000 bulk litres each of rectified spirit arrived at the station of destination with the seals intact. The Trichy Distilleries had no control over the consignment after it was put in the tanker wagons at the station of origin. Therefore they cannot be held responsible for the excess loss in

transit which has occurred by the three wagons leaking through the bottom valves. They had not been called upon to offer their explanation for the excess loss in transit, and even if they had denied their liability for the same, the Department should have established that the excess loss in transit had occurred due to some act of omission or commission on the part of Trichy Distilleries and that the quantity of rectified spirit found to be missing in excess of the permissible limit of 0 5 per cent has gone into the open market in the form of liquor fit for human consumption.

29 In *Commissioner of Income-tax* v. *Anwar Ali*[1] The Supreme Court has observed:—

"The first point which falls for determination is whether the imposition of penalty is in the nature of a penal provision. The determination of question of burden of proof will depend largely on the penalty proceeding being penal in nature or being merely meant for imposition of an additional tax, the liability to pay such tax having been designated as penalty under section 28 of the Income-tax Act, 1922. One line of argument which has prevailed particularly with the Allahabad High Court in *Lal Chand Gopal Das* v. *Commissioner of Income-tax Uttar Pradesh*[2] is that there was no essential difference between tax and penalty because the liability for payment of both was imposed as a part of the machinery of assessment and the penalty was merely an additional tax imposed in certain circumstances on account of the assessee's conduct The justification of this view was founded on certain observations in *C A. Abraham* v. *Income-tax Officer, Kottayam*[3]. It is true that penalty proceedings under section 28 are included in the expression "assessment" and the true nature of penalty has been held to be additional tax. But one of the principal objects in enacting section 28 is to provide a deterrent against recurrence of default on the part of the assessee. The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest. It is significant that in *C A. Abraham's case*[3] this Court was not called upon to determine whether penalty proceedings were penal or of quasi-penal nature and the observations made with regard to penalty being an additional tax were made in a different context and for a different purpose.

It appears to have been taken as settled by now in the sales tax law that an order imposing penalty is the result of quasi-criminal proceedings..........

"The next question is that when proceedings under section 28 are penal in character what would be the nature of the burden upon the department for establishing that the assessee is liable to payment of penalty .... As has been rightly observed by Chagala C.J., in *Commissioner of Income-tax* v. *Gokuldas Harivallabhadas*[1] the gist of the offence under section 28 (1) (*c*) is that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and, therefore, the department must establish that the receipt of the amount in dispute, constitutes income of the assessee. If there is no evidence, on the record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes his taxable income".

30. In the present case, no explanation has been called for regarding the loss in transit and therefore no inference that the quantity lost in excess of the permissible limit of 0.5 per cent has gone into open market, can be drawn in the absence of any evidence in that regard. The learned Advocate-General merely contended that no burden is thrown on the Trichy Distilleries, the licensees and that if there is any excess wastage in transit, a duty is cast on the licensee to explain the same. It is not possible to agree with this submission. I agree with the learned counsel for Trichy Distilleries that in so far as rule 42 does not require the department to prove that the quantity which had not been received at the station of destination in excess of the permissible limit of 0·5 per cent, has gone into the open market by any act or omission on the part of Trichy Distilleries, the consignors, is illegal to the extent it authorises the levy of duty without proving any contumacious conduct of the distiller, exporter. I find accordingly.

1. (1970) 76 I.T.R. 596: (1971) 1 S.C.J. 694: (1971) 1 I.T.J. 531: (1971) 1 S.C.R. 446: A.I.R. 1970 S.C. 1782.

2 (1963) 48 I T.R. 324.

3. (1961) 41 I.T.R. 425: (1961) 1 An. W.R. (S.C.) 183: 1961) 1 S.C.J 673: (1961) 1 M.L.J. (S.C.) 183: A.I.R. 1961 S.C. 609.

1. I.L.R. (1958) Bom. 1162: 1958 Bom. L.R. 960; 34 I.T.R. 98: A.I.R. 1959 Bom. 96.

31. The sixth ground urged by the learned counsel for Trichy Distilleries is that by adopting the tariff rate as the rate of duty to be levied on the excess loss in transit, the State Legislature had abdicated its legislative power. The Indian Tariff Act, 1934 has been passed to consolidate the law relating to customs duties on goods imported or exported by land. Import duty is levied so as to prevent import of goods into the Indian Union. The learned counsel for the Trichy Distilleries submitted that to adopt such a table for imposing duty on rectified spirit is wholly unrelated to the object of the Distillery Rules, 1960. Item 22 (4) of the first schedule to the Indian Tariff Act, 1934 provides for the levy of excise duty in the nature of revenue at Rs. 80.00 per litre or 270 per cent. *ad valorem* whichever is higher on spirits (other than denatured spirit), namely Brandy, gin, whisky and other sorts of spirits not otherwise specified including wines containing more than 42 per cent. of proof spirit Rule 2 (*k*) of the Madras Distillery Rules, 1960 says that "tariff rate" means the rate of import duty prescribed under the Indian Tariff Act, 1934 or any other law for the time being in force relating to the duties of customs on goods imported into the Indian Union. The learned counsel for Trichy Distilleries submitted that the Tariff Act, 1934 remains constant, but the table of rates in the first schedule is changed from time to time and that the State Legislature by subordinate legislation has adopted that table of rates without applying its mind to the rate of duty and has thereby abdicated its legislative power. The learned counsel for Trichy Distilleries relied on the decisions of the Supreme Court in *Shama Rao* v. *Union Territory of Pondicherry*[1] and *Delhi Municipality* v. *B.C.S. & W. Mills.*[2] The first of these two decisions relates to Pondicherry General Sales Tax Act X of 1965. The administration of Pondicherry became vested in the Government of India on 16th August, 1962 by virtue of *de jure* transfer. The Pondicherry Administration Act XLII of 1962 constituted that territory as a separate centrally administered unit, and under the Union Territories Act XX of 1963 a legislative assembly was set up for that area. The Assembly under that act acquired the power of enacting laws in respect of items in Lists II and III of the Seventh Schedule to the Constitution. The Assembly thereafter passed the Pondicherry General Sales Tax Act X of 1965. Section 1 (2) of that Act provided that the Act would come into force on such date as the Government by notification appoint. Section 2 (1) provided that:—

> "The Madras General Sales Tax Act, 1959 as in force in the State of Madras, immediately before the commencement of this Act shall extend to and come into force in the Union Territory of Pondicherry subject to the following modifications and adaptations.........."

The assessee in that case was a merchant carrying on business in liquor and a dealer within the meaning of the Madras Act. Upto March, 1966, he was liable and was paying certain taxes similar to the sales tax under the French regulations till then in force in Pondicherry. With the coming into force of the Pondicherry General Sales Tax Act, 1965, he was served with a notice to register himself as a dealer. Thereupon he filed a writ petition challenging the validity of the principal Act, namely Pondicherry General Sales Tax Act, 1965. The question for consideration in that case was whether in extending the Madras Act in the manner and to the extent it did under section 2 (1) of the Pondicherry General Sales Tax Act, 1965, the Pondicherry legislature abdicated its legislative power in favour of the Madras legislature. The Supreme Court has observed:

> "It is manifest that the Assembly refused to perform its legislative function entrusted under the Act constituting it. It may be that a mere refusal may not amount to abdication if the legislature instead of going through the full formality of the legislation applies its mind to an existing statute enacted by another legislature for another jurisdiction, adopts such an Act and enacts to extend it to the territory under its jurisdiction. In doing so, it may perhaps be said that it has laid down a policy to extend such an Act and directs the executive to apply and implement such an Act. But when it not only adopts such an Act but also provides that the Act applicable to its territory shall be the Act amended in

1. (1967) 2 I.T.J. 684: (1967) 2 An.W.R. (S.C.) 98: (1967) 2 M.L.J. (S.C.) 98: (1967) 2 S.C.J. 749: A.I.R. 1967 S.C. 1480.

2. (1969) 1 S.C.J. 621: (1968) 2 S.C.R. 251: A.I.R. 1968 S.C. 1232.

future by the other legislature, there is nothing for it to predicate what the amended Act would be. Such a case would be clearly one of non-application of mind and one of refusal to discharge the function entrusted to it by the Instrument constituting it. It is difficult to see how such a case is not one of abdication or effacement in favour of another legislature at least in regard to that particular matter......

"In the present case, it is clear that the Pondicherry legislature not only adopted the Madras Act as it stood at the date when it passed the principal Act (Pondicherry General Sales Tax Act, 1965) but also enacted that if the Madras Legislature were to amend its act prior to the date when the Pondicherry Government would issue its notification, it would be the amended act which would apply. The legislature at that stage could not anticipate that the Madras act would not be amended nor could it predicate what amendment or amendments would be carried out or whether they would be of a sweeping character or whether they would be suitable in Pondicherry. In point of fact the Madras act was amended and by reason of section 2 (1) read with section 1 (2) of the Principal Act it was the amended Act which was brought into operation in Pondicherry. The result was that the Pondicherry legislature accepted the amended Act though it was not and could not be aware what the provisions of the amended Act would be. There was in these circumstances a total surrender in the matter of sales tax legislation by the Pondicherry Assembly in favour of the Madras legislature and for that reason we must agree with Mr. Desai that the Act was void or as is often said 'still-born'."

32. In the Delhi Municipal Corporation case, it is observed by the Supreme Court that "the question as to the limits of permissible delegation of legislative power by a legislature to a subordinate authority has come before this Court in a number of cases and the law as laid down by this Court is not in doubt now. Considering the complexity of modern life it is recognised on all hands that the legislature cannot possibly have time to legislate in every minute detail. That is why it has been recognised that it is open to the legislature to delegate to subordinate authorities the power to make ancillary rules for the purpose of carrying out the intention of the legislature indicated in the law which gives power to frame such ancillary rules. The matter came before this Court for the first time *In re*, the Delhi Laws Act,[1] and it was held in that case that it could not be said that an unlimited right of delegation was inherent in the legislative power itself. This was not warranted by the provisions of the Constitution, which vested the power of legislation either in Parliament or State Legislatures and the legitimacy of delegation depended upon its being used as an ancillary measure which the legislature considered to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative function. Exactly what constituted "essential legislative function", it was held further, was difficult to define in general terms, but this much was clear that the essential legislative function must at least consist of the determination of the legislative policy and its formulation as a binding rule of conduct."

33. The learned Advocate-General contended that there is no abdication of legislative power and the the case is one of legislation by reference to another legislation. Rule 42 which is in the nature of subordinate legislation provides for levy of duty on the excess loss in transit at the tariff rate. It was not disputed by the learned Advocate General that the Tariff Act, 1934 remains constant and that the table of rates of duty is varied from time to time. In so far as rule 42 adopts the tariff rate without applying its mind to the rate though the tariff rate is varying from time to time under the provisions of the Tariff Act, 1934, there is a clear case of abdication of the legislative power by the State Legislature. Therefore I agree with the learned counsel for Trichy Distilleries and hold that by adopting the tariff rate as the rate of duty to be levied, the State Legislature has abdicated its legislative power and that it is not a case of legislation by reference to another legislation.

34. The seventh ground urged by the learned counsel for the Trichy Distilleries is that rule 42 of the Madras Distillery Rules, 1960 is unreasonable in so far as it allows wastage only 0.5 per cent whatever the distance to which the rectified spirit is transported from the Distillery. It was submited by the learned counsel for Trichy Distilleries that in the rules framed in 1932 under the provisions

1. 1951 S.C.R. 747: 1951 S.C.J. 527: A.I.R. 1951 S.C. 332.

of the Madras Abkari Act (I of 1886) different rates of allowance were given for wastage in transit depending upon the time taken and the distance over which rectified spirit was transported. Rule 54 of those rules had allowed two to seven and half per cent for duration of journey not exceeding 2 days and to journey not exceeding 15 days. But under the Madras Distillery Rules, 1960, the percentage allowed is only 0.5 per cent. In the present case the actual wastage in transit works out to 3 per cent in respect of the three lakhs bulk litres. Therefore it was submitted that providing only 0.5 per cent for the loss in transit irrespective of the distance and the time taken, is unreasonable. The Supreme Court has observed in *Abdul Quader and Co.* v. *Sales Tax Officer*[1] that even tax statutes have to satisfy the test of reasonableness prescribed by clause 6 of Article 19 of the Constitution. In *M/s. K. Babulal and Bros.* v. *H.C. Patel*[2] section 12 A (4) of the Bombay Sales Tax Act, 1946, was extracted and it reads as follows:—

"(4) If any person collects any amount by way of tax in contravention of the provisions of sub-section (1) or (2) or if any registered dealer collects any amounts by way of tax in excess of the amount payable by him under this Act, the amounts so collected shall, without prejudice to any prosecution that may be instituted against such person or dealer for an offence under this Act, be forfeited to the State Government and such person or dealer, as the case may be, shall within the prescribed period. pay such amount into a Government treasury and in default of such payment, the amount shall be recovered as an arrear of land revenue".

The Supreme Court held that section 12-A (4) is unreasonable. In that case the appellants before the Supreme Court were dealers registered under the Bombay Sales Tax Act carrying on business in art silk etc., During the period 26th January, 1950 to 31st March, 1950, they effected various sales outside the State of Bombay. Those sales being protected by Article 286 (1) (*a*) of the Constitution of India, were outside the reach of the Act. However, the Sales Tax Officer assessed the turnover relating to those sales and levied tax of Rs. 4,494-3-9. In appeal, the order of the Sales Tax Officer was affirmed by the Assistant Collector of Sales Tax. But the Additional Collector of Sales Tax, in revison, revised the levy to some extent and ordered a refund of Rs. 2,238-0-6 which was paid to the assessee. Not being satisfied with the order of the Additional Collector of Sales Tax, the appellants took up the matter in revision to the Sales Tax Appellate Tribunal. But even before they moved the Tribunal in revision, the Additional Collector of Sales Tax, by his letter dated 17th May, 1958. informed the appellants that unless they furnished to the Sales Tax Officer, proof of their having refunded the amount paid to them in pursuance of his order to the purchasers within a period of three months from the date of that notice, the same would be liable to be forfeited under section 12-A (4) of the Act The Tribunal by its order dated 26th November, 1958, allowed the claim of the appellants in full and directed the refund of an additional sum of Rs. 2,256-2-6. The Supreme Court held that "the forfeiture provided for in section 12-A (4) *prima facie* infringes Article 19 (1) (*f*). Therefore it is for the department to satisfy the Court that the impugned provision is a restriction imposed in the interest of the general public. The learned Judges held further that "the power conferred under section 12-A (4) is unguided, uncanalised and uncontrolled and therefore arbitrary." In the present case, the allowance made for wastage in transit is 0.5 per cent irrespective of the time taken and the distance over which the rectified spirit was taken from the place of despatch whereas under the corresponding rule 54 of the rules framed under the Madras Abkari Act, 1886 different rates varying from 2 to 7½ per cent had been allowed having regard to the time taken for the rectified spirit to reach the station of destination from the station of origin.

35. Rectified spirit is a commodity which is liable to waste if it is exposed to weather and put in transit. It is needless to say that providing only 0.5 per cent. for wastage irrespective of the distance over which the rectified spirit is taken or the time during which it is taken from the place of despatch to the place of destination is unreasonable. The learned Advocate-General submitted that in the old Rules, rule 54 (1) and (2) applied only to transport on wooden receptacles, but the present rule 42 does not contemplate transport in wooden receptacles. This does not in any way meet the argument of the learned counsel for the Trichy Distilleries. I therefore agree

1. (1964) 2 M.L.J. (S.C.) 54: (1964) 2 An W.R. (S.C.) 54: (1964) 2 S.C.J. 229: (1964) M.L.J. (Crl.) 469: A.I.R. 1964 S.C. 922.

2. (1968) 1 S.C.J. 768: (1968) 1 S.C.R. 735: A.I.R. 1968 S.C. 445.

with the learned counsel for Trichy Distilleries and hold that rule 42 of the Madras Distillery Rules, 1960, in so far as it allows only 0. 5 per cent. irrespective of the distance to which the rectified spirit is transported, is unreasonable.

36. The eighth ground urged by the learned counsel for the Trichy Distilleries is that no notice has been given to the Trichy Distilleries to show cause why penalty should not be levied, that rule 42, as it now stands, does not contemplate any such notice and that therefore there is violation of the principles of natural justice. The learned Advocate-General conceded thet notice should have been given to the Trichy Distilleries and stated that if such a notice had been given, the Trichy Distilleries might have taken advantage of the proviso to rule 42. He requested that the matter may be sent back to the Department for issuing such notice and taking further proceedings But the learned counsel for Trichy Distilleries is not agreeable to this course and she submitted that when Trichy Distilleries are attacking the very validity of rule 42, there is no question of the matter going back to the Department for further proceedings being taken after the issue of a show cause notice.

37. One of the pleas advanced before the Supreme Court in the *Bengal Immunity Company Ltd.* v. *The State of Bihar and others*[1] was that the appellant-company in that case was not entitled to take proceedings praying for the issue of prerogative writs under Article 226 as it had adequate alternative remedy under the impugned Act by way of appeal or revision. The learned Judges have observed that.

"the answer to this plea is short and simple, the remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself *ultra vires* and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is *ultra vires* the Legislature which enacted it and as such void an prays for appropriate relief under Article 226".

1. (1955) 2 S.C.R. 603 (1955) 2 M.L.J. (S.C.) 168: 1955 S.C.J. 672: (1955) 6 S.T.C. 446: A.I.R. 1955 S.C. 661.

In that view, the Supreme Court has held that the High Court

was not right in holding that the petition under Article. 226 was misconceived or was not maintainable. The Full Bench of the Gujarat High Court has observed in *Ahmedabad Cotton Manufacturing Co., Ltd.* v. *Union of India*[1].

"Therefore, the principle which emerges from these decisions is that when the petitioner is to be asked to exhaust his alternative remedies provided under the Act before entertaining the writ petition, this distinction in *Ahmedabad Cotton Manufacturing Co., Ltd.* v. *Union of India*[1] would always be material where the order is a nullity as being *ex facie* without jurisdiction or in non-compliance with the provisions of the act or the essential principles of justice or on any other ground as explained in *Union of India* v. *Tarachand Gupta & Bros.*,[2] or *Bhopal Sugar Industries* v. *Sales Tax Officer*[3] or *State of Uttar Pradesh* v. *Mohd. Nooh*[4] and is, therefore, a purported order or a nullity. In such a context the alternative remedy would be a futile remedy because it did not affect the inherent nullity in the challenged decision. which would result in material distinction that the party may appeal against such decision but he was not bound to do so.

As pointed out in *Dana Nathu* v. *Sub-Divisional Magistrate, Rajkot*[5], if the order of the executive authority is an *ultra vires* order, it would be a nullity and even if an appeal is filed, the order confirmed in appeal would also be a nullity. Therefore, in such cases where the challege is on the ground that the order is an *ultra vires* order, the question of exhausting alternative remedy could hardly arise as the petitioner could straightaway seek remedy of judicial review."

The Supreme Court has held in M/s. *Baburam Prakash Chandra Maheswari* v. *Antarim Zila Parishad*,[6] that:

1. (1977) 18 Guj. L.R. 714: A.I.R. 1977 Guj. 113.
2. (1971) Tax. L.R. 706: (1971) 3 S.C.R. 557: A.I.R. 1971 S.C. 1558.
3. (1964) 1 S.C.R. 488: A.I.R. 1967 S.C. 549.
4. 1958 S.C.J. 242: 1958 S.C.R. 595: (1958) M.L.J. (Crl.). 197: A.I.R. 1958 S.C. 86.
5. (1973) 14 Guj. L.R. 209, 213.
6. (1969) 1 S.C.J. 878: (1969) 1 S.C.R. 518: A.I.R. 1969 S.C. 556.

"Where the petitioner invoking the jurisdiction under Article 226 of the Constitution alleged in his application that the taxing provisions are *ultra vires* and there was violation of the principles of natural justice, the High Court would not be justified in summarily dismissing the writ petition on the ground that the petitioner had an alternative remedy of a statutory appeal."

In these circumstances, I agree with the learned counsel for the Trichy Distilleries and find that the duty or penalty has been levied in this case without issuing any notice to show cause against such action being taken and it is in violation of the principles of natural justice and that since the writ petitioners in these writ petitions are attacking the validity of rule 42 of the Madras Distillery Rules under which levy has been made, it is open to them to file these writ petitions without taking recourse to the proviso to rule 42 (*a*) of those Rules.

38. The last ground urged by the learned counsel for the Trichy Distilleries is that it is reasonable to assume that rule 42 has been framed by inadvertence. This is really not a ground of attack. The levy cannot be attacked if otherwise valid merely on the ground that rule 42 has been framed by inadvertence even if that was the case.

39. The learned Advocate General submitted that Sirsilk are the purchasers of the rectified spirit from Trichy Distilleries and that they are strangers to the department and therefore cannot question the validity of rule 42 of the Madras Distillery Rules, 1960. But Mr. Lukose, the learned counsel for Trichy Distilleries in other respects submitted that having regard to the fact that the Trichy Distilleries has executed a bond in favour of the first respondent as required by rule 35 or rule 38 of the Madras Distillery Rules, 1960 and Trichy Distilleries have in turn obtained an indemnity bond from Sirsilk and declined to make further supply notwithstanding the fact that Sirsilk had prepaid a sum of Rs. 2,82,383 to Trichy Distilleries so long as the demand made on the Trichy Distilleries by the first respondent is not complied with by Sirsilk in pursuance of the indemnity bond executed by them in favour of Trichy Distilleries, Sirsilk, are aggrieved persons entitled to file the writ petition under Article 226 of the Constitution of India questioning the validity of the levy of duty under rule 42 of the Madras Distillery Rules, 1960. In this connection, the learned counsel for Sirsilk relied upon the decision of the Saurashtra High Court in *Chhaganlal* v. *Asst. Custodian Evacuee Property*[1]. In that case Chhaganlal Nanji Premji and others, appellants before the Saurashtra High Court, had obtained a money decree for Rs. 40,000 odd inclusive of costs against Kadarbhai, an evacuee, from the Court of the Civil Judge, Senior Division, Jamnagar on 30th April, 1951. The Assistant Custodian, Evacuee Property, Jamnagar, was impleaded as a party to the suit on the ground that the property of Kadarbhai was taken possession of as evacuee property and the sale proceeds thereof were held by the Collector of Jamnagar. The Assistant Custodian pleaded that Kadarbhai had not then been declared an evacuee. Thereupon the Assistant Custodian's name was struck off from the suit. The order of the Assistant Custodian, which was impugned mentions that a notice was issued against Kadarbhai on 8th June, 1951. But it was admitted before the High Court that the notice had not been served on Kadarbhai and that it was merely affixed on the notice board of the Office of the Assistant Custodian. One of the objections taken before the High Court was that a petition for a writ under Article 226 of the Constitution can lie only at the instance of a person whose right has been infringed and that in that case the appellants being merely money decree-holders, they have no right to Kadarbhai's property. The learned Judges have observed:

"Now here although the appellants may not have a direct right to the property in question they are nevertheless aggrieved parties inasmuch as they hold a decree against Kadarbhai to realise which they have a right to proceed against Kadarbhai's property, that is to say, to attach the amount lying with the Collector, but this remedy is denied to them by the Assistant Custodian's order and their interests are thus injuriously affected. That order therefore does involve direct injury to the appellants' interests and as a party affected they are entitled to apply for a writ."

40. In *S.M. Transport* v. *Raman and Raman*[2] the learned Judges have extracted the following observations of Earl of Reading, CJ. made in

1. A.I.R. 1956 Sau. 47.

2. (1961) 2 M.L.J. 127: I.L.R. (1961) Mad. 110: A.I.R. 1961 Mad. 180.

Rex v. *Richmond Confirming Authority* Ex parte *Howitt*[1]:

"The applicant does not in my opinion stand in the same category as a member of the public who may be said to have only a general interest in seeing that the law is properly carried out. He had a particular interest in this subject-matter, and nothing can better show this than the fact that he incurred the expenses of instructing counsel to secure, if he could, the refusal of the confirmation and to contend that the confirming authority had no jurisdiction. Bearing in mind that the applicant is a person who was entitled to appear and object as having this interest that he was carrying on business as the licensee of premises in Richmond, I think the case comes within the decision of *Rex* v. *Groom* Ex-parte *Cobbold.*[2]

The learned Chief Justice quoted the following from the judgment of Lord Alverstone, CJ., in that case:—

"It is sufficient if they have a real interest in the decision of the Justices and they have in this case. They took the point now raised before the Justices at the adjourned general annual licensing meeting and when the confirming order was made, and it would be too strong to say that they had not a sufficient interest in the matter to enable them to apply for the rule. 'The true principle is to determine whether the applicant has an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered."

In the present case, Sirsilk have the general interest in the law being now wrongly administered. They have a special interest in seeing that the duty levied by the first respondent on the excess loss in transit is not recovered from the Trichy Distilleries in exercise of the power conferred by rule 42 of the Madras Distillery Rules, 1960, for if the amount is recovered from the Trichy Distilleries, they would have to make good the same to the Trichy Distilleries in whose favour they have executed an indemnity bond in respect of the very same transaction. Therefore I agree with the learned counsel for Sirsilk and hold that Sirsilk are aggrieved persons and that they are entitled to file Writ Petition No. 3377 of 1975.

1. (1921) 1 K.B 248 at 253.

2. (1901) 2 K.B 157.

41. For the reasons mentioned above, both the writ petitions are allowed with costs. Advocate's fee Rs. 500 in W.P. No. 5172 of 1975 and Rs. 250 in W.P. No. 3377 of 1975.

R. S. —— *Petitions allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *V. Ratnam, J.*

D. Nataraja Achari .. *Appellant/1st Defendant**

v.

Balambal Ammal .. *Respondent/plaintiff.*

Civil Procedure Code (*V of* 1908), *Order* 20, *rules* 12 *and* 18—*Suit for partition Allotment of share income—Contention by defendant that share income should be restricted to a period of three years only not tenable—Order* 20, *rule* 18 *applies.*

The plaintiff filed a suit for partition and separate possession of her share in the suit property and also for an account of the income collected by the 1st defendant. The trial Court granted a preliminary decree for partition and also provided that the plaintiff could apply for ascertainment of the income from the property. The plaintiff filed an application for appointment of a Commissioner to divide the property by metes and bounds and for payment of her share of the income from the property in question. The Commissioner made his report. The trial Court on a consideration of the report allotted the southern portion of the property to the plaintiff and also directed that a sum of Rs. 4,160 be paid to the plaintiff by the 1st defendant towards her share in the income. On appeal by the first defendant this was confirmed. The 1st defendant filed a second appeal and contended that the period for which the plaintiff could be awarded her share of income was three years from the date of the decree.

Held: Order 20, rule 18, Civil Procedure Code, would govern the present case and not Order 20, rule 12 and therefore, the objection of the appellant that the mesne profits could not be given for more than three years from the date of the decree did not hold good.

[*Para.* 6.]

The fixation of mesne profits at Rs. 4,160 for the period in question and the allotment of

*S.A. No. 191 of 1976. *13th March, 1979.*

the property to the share of the first defendant as had been done in the final decree appealed against were unassailable. [*Para.* 7.]

Cases referred to:—

Basavayya v. *Guravayya*, (1951) 2 M.L.J 176: 64 L.W. 669: I L R. ('952) Mad. 173: A I R. 1951 Mad. 938; *Chittoori Subbamma* v. *Kadappa Subbanna*, (1966) 1 M.L J. (S.C.) 67: (1966) 1 An W.R. (S.C.) 67: (1966) 1 S.C.J. 269: (1965) 2 S.C.R. 661: A.I.R. 1965 S C 1325; *Subba Reddiar* v. *Hara Bibi*, (1972) 85 L.W. 699: A.I.R. 1973 Mad. 237.

Appeal against the decree of the City Civil Court (IV Additional Judge), Madras in Appeal Suit No. 243 of 1974 preferred against the decree of the City Civil Court (V Asst. Judge) of Madras in Original Suit No. 2423 of 1961.

N. Sivamani and *N. Krishna Mitra*, for Appellant.

A.S. Udhaya Shanker, for Respondent.

The Court delivered the following.

JUDGMENT.—The 1st defendant in the suit is the appellant in this second appeal which arises out of the final decree proceedings in a suit for partition instituted by the first respondent herein in O S. No. 2423 of 1961, on the file of the learned 5th Assistant Judge, City Civil Court, Madras.

2. The facts are not in dispute. The first respondent instituted the suit for partition and separate possession of her 3/4 share in the property mentioned in the schedule to the plaint or in the alternative for a moiety thereof and also for an account of the income collected by the appellant and for the appointment of Receiver and other incidental reliefs. By a preliminary decree dated 24th December, 1963, the first respondent herein was granted a decree for partition in respect of a half share of the suit property and clause (2) of the preliminary decree provided that the first respondent shall also be at liberty to apply for the ascertainment of the income from the property and the allotment of her share therein. There was an appeal against this preliminary decree in A S. No. 201 of 1964 to this Court, which was disposed of on 9th September, 1970 with certain modifications. Pursuant to the preliminary decree granted in favour of the first respondent as modified by this Court, she filed I. A. No. 1877 of 1971 for the appointment of a Commissioner to divide the property by metes and bounds and also for ascertainment and payment of her share of the income from the property in question. A Commissioner was appointed and he submitted a report with reference to the suggested mode of allotment of the property and also the quantum of income referable to the share of the 1st respondent. The trial Court, on a consideration of the report of the Commissioner, by its Judgment and decree dated 10th January, 1973, allotted the southern portion of the suit property to the 1st respondent and the northern portion to the appellant. It further directed that a sum of Rs. 4,160 be paid to the 1st respondent by the appellant towards her share of income. Aggrieved by this, the appellant preferred an appeal in A S. No. 243 of 1974, before the learned 4th Additional Judge, City Civil Court, Madras. The appellate Court also confirmed not only the mode of allotment, but also felt that the assessment and ascertainment of the share of the income of the first respondent at Rs. 4,160 was not only reasonable, but unexceptionable. In the result, the appeal was dismissed. It is against that the appellant has now come up before this Court in second appeal.

3. The only contention that is urged by the learned counsel for the appellant in this second appeal is that the maximum period for which the first respondent could be awarded her share of income is three years from the date of the decree and in this case, the Courts below should not have, therefore, awarded mesne profits for a period in excess of that period and that the award of mesne profits thus given is not in conformity with the provisions of the Civil Procedure Code. *viz*., Order 20, rule 12, It may immediately be stated that this contention was not raised in the Courts below in the form in which it is now presented before this Court. However, since it is a point of law, which does not call for any further investigation of facts, the learned counsel for the appellant was allowed to raise the same.

4 In order to appreciate this contention, it becomes necessary to examine the terms of the preliminary decree and ascertain whether Order 20, rule 12 of the Civil Procedure Code would apply to instant came at all. The relevant clauses of the decree in O.S. No. 2423 of 1961 run thus:

> "1. That the property mentioned in the schedule be divided into two equal shares and the plaintiffs be allotted one such share;
>
> 2. that the plaintiff shall be at liberty to apply by way of a separate application for

ascertaining the income from the property and allotment of her share therein."

On appeal in A.S No. 201 of 1964, this decree, in so far as it is relevant for this second appeal, was modified by this Court on 9th September, 1970, thus

"1. That the appellant (1st defendant) do render accounts for the period commencing from 31st May, 1961 (*viz*, the date of plaint) in respect of the rental collections made by him and that the 1st appellant (1st defendant) shall get credit for Rs. 150 (Rupees one hundred and fifty only) paid on the file of the High Court."

At this stage, it is necessary to set out the provisions of Order 20, rules 12 and 18, Code of Civil Procedure. Order 20, rule 12 runs, thus:

"*Decree for possession and mesne profits*:—

1. Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree:—

(*a*) for the possession of the property;

(*b*) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

(*ba*) for the mesne profits or directing on enquiry as to such mesne profits;

(*c*) directing an inquiry as to rent or mesne profits from the institution of the suit until

(i) the delivery of possession to the decree-holder; or

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

2. where an inquiry is directed under clause (*b*) or clause (*c*) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry."

5. Order 20, rule 18, Civil Procedure Code which specifically deals with the case of a suit for partition and separate possession of a share in the property runs, thus:

"*Decree in suit for partition of property or separate possession of a share therein*—Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then—

(*i*) If and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any Gazetted Subordinate of the Collector deputed by him in his behalf in accordance with such declaration and with the Provisions of section 54:

2. If and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property giving much further directions as may be required."

The relative scope of Order 20, rule 12 and Order 20, rule 18, Civil Procedure Code, has been the subject-matter of an illuminating and exhaustive discussion by a Full Bench of this Court in the decision reported in *Basavayya* v. *Guruvayya*[1], At page 177, the Full Bench observed, thus:

"It is necessary at the outset to distinguish between three types of cases in which a question of profits or mesne profits might arise. (1) Suits for ejectment or recovery of possession of immovable property from a person in possession without title, together with a claim for past or past and future mesne profits. (2) Suits for partition by one or more tenants-in-common against others with a claim for account of past or past and future profits. (3) Suits for partition by a member of a joint Hindu family with a claim for an account from the manager. In the first case, the possession of the defendants not being lawful, the plaintiff is entitled to recover "mesne profits" as defined in section 2, clause (12) of the Civil Procedure Code, such profits being really in the nature of damages. In the second case, the possession

1. (1951) 2 M.L.J. 176 : 64 L.W. 669: I.L.R. (1952) Mad. 173: A.I.R. 1951 Mad. 938.

and receipt of profits by the defendant not being wrongful the plaintiff's remedy is to have an account of such profits making all just allowance in favour of the collecting tenant-in-common. In the third case, the plaintiff must take the joint family property as it exists at date of the demand for partition and is not entitled to open up past accounts or claim relief on the ground of past inequality of enjoyment of the profit, except where the manager has been guilty of fraudulent conduct or misappropriation".

6. The Full Bench also held that Order 20, rule 12, Civil Procedure Code, deals with the first class of suits above referred, while Order 20. rule 18 would take in suits in the second and third categories. It was also further held that Order 20, rule 12 relates to "mesne profits" in the sense in which that expression is defined in section 2 (12) of the Civil Procedure Code and that the claim of the plaintiff suing for partition and his share of profits accruing from the lands pending the suit is not, properly speaking, a claim for mesne profits and Order 20, rule 12 Civil Procedure Code, has no application to such a case. The learned counsel for the appellant, however, would strongly rely upon a decision of the Supreme Court in *Chittoori Subbamma* v. *Kadappa Subbanna and others*[1] and urge that the first respondent cannot be granted a decree in respect of mesne profits in excess of three years from the date of the decree. The question, therefore, is whether the first respondent decree-holder could be denied her share of the income for a period in excess of three years. The scope and applicability of the judgment of the Supreme Court relied upon by the learned counsel for the appellant was the subject-matter of the judgment of a Division Bench reported in *Subba Reddiar* v. *Hara Bibi.*[2] In that case also, the same objection that is being raised in the present second appeal by the learned counsel for the appellant was raised, relying upon the aforesaid judgment of the Supreme Court reported in *Subbamma's case*[1]. The Division Bench examined the provisions of Order 20, rule 12 and Order 20, rule 18, Civil Procedure Code, and followed the ratio of the Full Bench of this Court reported in *Basavayya* v. *Guruvayya*[1], and ultimately held that Order 20, rule 12 of the Code of Civil Procedure will not be applicable to a case like the present case, because when an account of the income from the property pertaining to the share of the plaintiff is ordered upto the date of the final decree what actually happens is the division of an integral portion of the hotchpot comprising of not only the property but also the income and accretions thereto upto the date of the final decree and to such a case, Order 20, rule 12 will be inapplicable. In addition, the Division Bench also examined in detail the judgment of the Supreme Court and held that a careful perusal of the minority and the majority views shows that the entire discussion related only to the scope of Order 20, rule 12, Civil Procedure Code, and in particular whether the preliminary decree would be binding upon the defendant at the stage of the final decree proceedings and whether the objection that the period for the award of mesne profits should not exceed three years could be allowed to be raised for the first time before the High Court. It was also pointed out by the Division Bench that in the judgment of the Supreme Court there is no reference whatever to Order 20, rule 18, Civil Procedure Code, which deals with a case of suit for partition and mesne profits. It was also further pointed out that the Full Bench decision of this Court reported in *Basavayya's case*[1] was not even referred to and, therefore, it is rather difficult to countenance an argument that the Supreme Court by implication intended to over-rule the view taken by the Full Bench which has been followed in all other decisions of other High Courts. That being the position, the question of the applicability of the provisions of Order 20, rule 12 to the instant case does not arise because in this case, though the application purports to be one under Order 20, rule 12, Civil Procedure Code, it would fall within the second and third categories enumerated by the Full Bench and to which the provisions of Order 20, rule 12, will not be applicable Order 20, rule 18, Civil Procedure Code, would govern the present case and, therefore, the objection of the learned counsel for the appellant that the mesne profits cannot be given for more than three years from the date of the decree does not hold good.

7. The mode of allotment and the quantum of mesne profits were not in any manner

1. (1966) 1 M.L.J (S.C.) 67: (1966) 1 An.W.R (S.C.) 67: (1966) 1 S.C.J. 269: (1965) 2 S.C.R. 661: A.I.R. 1965 S.C. 1325

2. (1972) 85 L.W. 699: A.I.R. 1973 Mad. 237.

1. I.L.R. (1952) Mad. 173: (1951) 2 M.L.J. 176.

challenged by the learned counsel for the appellant. Therefore, I am of the view that the fixation of the mesne profits at Rs. 4,160 for the period in question and the allotment of the property to the share of the first defendant as has been done in the final decree appealed against are unassailable and the second appeal should, therefore, be dismissed with costs.

S.J. ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Kandaswamy Gounder .. *Appellant**

v.

Kandasamy Gounder S/o. Subbiah Gounder .. *Respondent.*

(A) *Tamil Nadu Cultivating Tenants' Protection Act* (*XXV of* 1955)—*Definition of "cultivating tenant"* —'N' *owner of property executing will giving life estate in favour of* 'C' *and absolute remainder in favour of* 'K'—*Lease by* 'C' *and* 'K' *jointly in favour of the 'plaintiff'*—'K' *died in* 1952—*Sale of the lands by* 'C' *to plaintiff—After* C's *death claim by* 'K's *husband—Plaintiff's suit for injunction claiming as cultivating tenant—Plaintiff whether entitled to the benefit of the Act.*

(B) *Civil Procedure Code* (*V of* 1908), *section* 11—Res judicata—*Applicability.*

One *N* had a daughter *C* and a grand-daughter *K*. By his will in 1924 *N* gave a life-interest in the suit property to *C* and the absolute reminder to *K*. *N* died in 1941. In 1948 *C* and *K* granted a lease in favour of the plaintiff. *K* died in 1952. Thereafter *C*, in 1953 executed a sale deed in favour of plaintiff. *C* died in 1969. *K*'s husband filed a suit for declaration of the sale to plaintiff as void and for possession. The suit was decreed and an appeal therefrom was dismissed. *K*'s husband took out execution. Thereupon the plaintiff filed the present suit in 1973 for an injunction to restrain *K*'s husband from interfering with his possession. In his written statement in the suit by *K*'s husband, the present plaintiff had claimed to be a *bona fide* purchaser for value. He had not put forward any case on the basis that in any event he was a 'cultivating tenant' within the scope of the Tamil Nadu Act XXV of 1955. In the present suit he set up such a claim. The defendant *K*'s husband contended that the plea was not open to the plaintiff and was barred by *res judicata*.

Held: The Act XXV of 1955 was enacted for the protection of cultivating tenants in certain areas in the State of Madras from unjust eviction. For this Act to apply, at the time when it came into force, a person must have been a tenant, so that there was need for any protection to him from unjust eviction. If he was not a tenant at the time when the Act came into force, he could not claim protection on the basis that he had continued in possession of the land after the determination of the tenancy agreement. Only when at the commencement of the Act he was a tenant he would be a tenant who continued in possession of the land after the determination of the tenancy agreement in consequence of the denial of the landlord's title by him. But that was not the position here, as the tenancy had merged with the ownership in the year 1953. This is not one of those cases where his ownership is itself in dispute. During the period between 31st October, 1953 and 9th December, 1969, there was no dispute about his being the owner of the property. The only question was whether he was entitled to claim ownership subsequent to that date. He could not maintain his ownership after the date, as the vendor had only a life interest in the property which determined on her death. The result was that he would not be entitled to the protection under the Act. [*Para.* 13.]

Section 4 of the Act provides for restoration of possession of any cultivating tenant, who was in possession of the land on 1st Deeember, 1953 and who was not in possession thereof at the commencement of the Act. Such a person could apply under section 4 to the Revenue Divisional Officer for the restoration of his possession on the same terms as those applicable to the possession of the land on 1st December, 1953. This provision also shows that the Act contemplated cases of possession by cultivating tenants only retrospectively upto 1st December, 1953. In the present case, the sale deed in favour of the plaintiff was prior to 1st December, 1953. Therefore, it would be unreasonable to give any further retrospective operation to the provision of the statute and grant him protection. [*Para.* 14.]

*S.A. No. 2259 of 1975. *25th January*, 1979.

In the earlier suit between the same parties for declaration, possession and mesne profits, there was a decree in favour of *K*'s husband, that is the defendant herein, and the decree had been affirmed on appeal. There was no second appeal against that decision. At no stage in those proceedings, the plaintiff herein put forward any claim that he was a 'cultivating tenant', though he could have put forward such a claim as an alternative defence to the prayer for possession, in the prior proceedings which he did not. A matter which might and ought to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit and the provisions of section 11 of the Code of Civil Procedure read with Explanation IV thereof, would, therefore, apply. [*Para.* 15.]

It is true that section 3 (1) prohibits eviction at the instance of the landlord in execution of a decree of a Court. However, the plea of his being a cultivating tenant should have been taken in the earl er proceedings. There was already a decree in favour of the defendant-respondent. That decree cannot be collaterally attacked in the present proceedings. The present suit has come to be filed only because that decree could not be challenged or otherwise resisted in the course of the execution proceedings. It was therefore, an attempt to set at naught the decree by filing a separate suit. If this plea had been taken in the earlier suit, it would have been suitably adjudicated upon. As the plaintiff did not in those proceedings take up this plea, it is too late in the day for him to take up such a plea by filing this suit. The whole scheme behind section 11, Code of Civil Procedure, is to avoid multiplicity of proceedings and the scheme will be set at naught if he is permitted to put forward such a plea at this stage. [*Para.* 15]

Cases referred to:—

D.V. Sanjeevi Naidu v. *M.N. Chiltibabu Mudaliar* (1953) 1 M.L J. 260: A.I R. 1953 Mad. 473; *Veeraswamy Naicker* v. *Alamelu Ammal*, (1965) 2 M.L.J. 188: I.L.R. (1966) 1 Mad. 177: 78 L.W. 281: A.I.R. 1965 Mad. 442; *R. Govindaswamy* v. *Bhoopalan*, (1977) 2 M.L.J. 206; *Damadi Lal* v. *Parashram*, 1976 Crl.L.J. 1755: (1977) 3 S.C.C. 346: A.I.R. 1976 S C. 2299; *Annamalai Goundar* v. *Venkatasami Naidu*, (1959) 1 M.L.J. 301: 72 L.W. 265: I.L.R. (1959) Mad. 796: A.I.R. 1959 Mad. 354.

Appeal against the decree of the Court of the Subordinate Judge, Udumalpet in Appeal Suit No. 61 of 1975, preferred against the decree of the Court of the District Munsif of Pollachi in Original Suit No. 841 of 1973.

S. Ramalingam and *N. Thyagarajan*, for Appellant.

V.C. Palaniswamy and *S.C. Palaniswamy*, for Respondent.

The Court delivered the following

JUDGMENT.—This appeal has been filed by the plaintiff in O.S. No. 841 of 1973 in the Court of the District Munsif of Pollachi. The suit is for an injunction restraining the defendant from interfering with the possession of the suit property. The plaintiff claimed to be a cultivating tenant covered by the provisions of the Tamil Nadu Act XXV of 1955. This suit came to be filed under the following circumstances. There was one Nanjappa Goundar, who had a daughter by name Chinnammal and a grand-daughter by name Kandammal. Nanjappa executed a will on 15th May, 1924, by which he gave a life-interest in the suit property in favour of his daughter Chinnammal and the absolute remainder in favour of his grand-daughter. He died in the year 1941. On 27th October, 1948, Chinnammal and Kandammal granted a lease in favour of the plaintiff. Kandammal died in the year 1952, even before the absolute estate in her favour could take effect. After the death of Kandammal, Chinnammal, the life estate holder executed a sale deed on 31st October, 1953, conveying the suit property in favour of the plaintiff claiming that she was entitled to the entire property. Chinnammal died on 9th December, 1969. After her death, the husband of Kandammal filed a suit O.S. No. 326 of 1970 in the Court of District Munsif, Coimbatore, seeking a declaration that the sale deed executed by Chinnammal was void and could not take effect after her lifetime and also for possession. The suit ended in favour of the husband of Kandammal. There was an appeal, which was dismissed. The husband of Kandammal took out execution of this decree, and then the present suit came to be filed on 29th September, 1973, alleging that the defendant-husband of Kandammal, was attempting to trespass into the suit property and for an injunction restraining him from interfering with the possession of the plaintiff. In the written statement in O.S. No. 326 of 1970 the plaintiff put forward the case that he had absolute title in his favour and that he was a *bona fide* purchaser without knowledge of any defect in title. He did not put forward

any case on the basis that, even assuming that his title to the property was not accepted, the prayer for possession could not be granted, as he was a cultivating tenant within the scope of the Tamil Nadu Act XXV of 1955. However, in the present suit he put forward the claim that he was a cultivating tenant entitled to the protection of the Tamil Nadu Act XXV of 1955 and that the husband of Kandammal could not disturb his possession.

2. In the written statement filed by the husband of Kandammal it was pointed out that this plea of the plaintiff being a cultivating tenant entitled to the protection of the Tamil Nadu Act XXV of 1955 was not open to him and was barred by *res judicata* in view of the fact that he did not put forward this plea in O.S. No. 326 of 1970. It was pointed out that the plaintiff in the present case had even deposited the mesne profits into the Court as per the directions of the appellate Court in the other suit. The right as a lessee or cultivating tenant was, it was pleaded, merged with the title that he claimed over the property, and that he did not have or continue to have any right as a cultivating tenant after this merger. It was pointed out that the present suit was only an attempt to hold on to possession of the property illegally and that it was only an attempt to resist the execution of the decree, which was binding on him.

3. The learned District Munsif held that there was no substance in the plea of *res judicata* and that the protection of the tenancy legislation could be claimed at this stage. Reliance was placed on section 3 of the Madras Cultivating Tenants Protection Act, which enjoined that no cultivating tenant should be evicted from his holding, by or at the instance of the landlord, whether in execution of a decree or order of a Court or otherwise, except for the grounds mentioned in the said Act. As the plaintiff was held to be entitled to the protection as a cultivating tenant, the suit for injunction was decreed. On appeal, the learned Subordinate Judge of Udumalpet reversed this judgment holding that the plaintiff had not proved his tenancy, and that as there was a decree for declaration and possession in favour of the defendant, the plaintiff could not set up the plea of tenancy, as the said plea was barred by *res judicata*. The result was that the decree passed by the lower Court was set aside and the appeal was allowed. It is this judgment which is now contested by the unsuccessful plaintiff.

4. Two questions arise for consideration in the present appeal. The first question is whether the plaintiff is a cultivating tenant entitled to the protection of the Act. The second question is whether even assuming that he is so entitled, the plea that he is a cultivating tenant, was barred by *res judicata*.

5. As regards the first question, there is no dispute that there was a lease jointly granted by Chinnammal and Kandammal on 27th October, 1948 in favour of the plaintiff. He continued to be in possession of this property as a tenant till 31st October, 1953 when he purchased the suit property from Chinnammal. The sale deed itself is not exhibited in this case. However, there can be no dispute about the fact that that the sale deed would be binding on Chinnammal during her lifetime. As mentioned already, she died on 9th December, 1969. Thus, between 31st October, 1953 and 9th December, 1969 there was a conveyance in favour of the plaintiff and then as a result of the life estateholder's title coming to an end, he lost his title to the property. The learned counsel for the appellant argued that the appellant-plaintiff would be in the position of a person, who had denied the title of the landlord to the suit property and the lease in whose favour would have come to an end, or would have determined on such denial. Thus, the point that required to be examined is whether this is a case in which it can be stated that as a result of denying title of the landlord, the lease in his favour could be said to have determined.

6. Section 111 of the Transfer of Property Act provides that a lease of immovable property determines by forfeiture in case lessee renounces his character as such by setting up a title in a third person or by claiming title in himself. A Bench of this Court has examined the effect of the determination of the lease in respect of a building by the denial of title of a landlord by a tenant in *D. A. Sanjeevi Naidu* v *M. N. Chittibabu Mudaliar*[1]. Sanjeevi claimed possession and mesne profits. He was granted a decree for possession. The tenant raised the objection in the execution proceedings that notwithstanding the decree, he was not liable to be evicted because of the provisions of section 7 (1) of the Madras Buildings (Lease and Rent Control) Act of 1949. It was provided in section 7 (1) that a tenant in possession of a building shall not be evicted therefrom, whether in execution of a decree

1. (1953) 1 M.L.J. 260: A.I.R. 1953 Mad. 473.

or otherwise and whether before or after, the termination of the tenancy, except in accordance with the provisions of that section. In the second proviso to that section it was provided that where the tenant denied the title of the landlord or claimed right of permanent tenancy, the Controller had to decide whether the denial or claim was *bona fide* and if he recorded a finding to that effect, the landlord was entitled to sue for eviction of the tenant in a civil Court, which could pass a decree for eviction on any of the grounds mentioned in the section notwithstanding that the Court found that such denial did not involve forfeiture of the lease or that the claim was unfounded. The claim of the tenant in that case was that he came into possession of the building under a lease in his favour on 15th April, 1944 and that though that lease expired in 1947, he must be deemed to be holding over as a tenant, since his claim under the agreement to sell the property in his favour had been negatived by the Court. In dealing with this submission it was held that as the tenant had set up title in himself, it might be taken as established that under the general law the tenancy had been duly terminated. The definition of tenant in the Rent Control Act included a person continuing in possession after the termination of the tenancy in his favour and the tenant in that case was found to be such a person. In that appeal against the suit, the tenant's claim for title was negatived. As regards his right as a tenant, it was pointed out that he continued to be a tenant all along and that therefore, he was entitled to the protection of the Rent Control Act. He could not, therefore, he evicted in execution of the decree for possession obtained by the landlord.

7. There is, however a later decision in *Veeraswami Naicker and another* v. *Alamelu Ammal and others*[1] which appears to take a different view. In that case also there was a lease in favour of the tenant from 29th April, 1933. The landlord terminated the lease on 30 June, 1958. The tenant then denied the landlord's title on the ground that he had purchased the suit site from the landlord himself. The landlord, therefore, gave another notice purporting to terminate the tenancy on the ground that the tenant had denied the title and set up title in himself. A suit for eviction followed. The trial Court as well as the first appellate Court found against the claim of title by the tenant They however, differed on the question whether he was entitled to the protection of the Madras City Tenants' Protection Act of 1922. The lower appellate Court was of the view that he was not entitled to the protection. The definition of 'tenant' in that case also comprehended persons continuing in possession, after the tenancy had come to an end, and in dealing with this question as to whether the tenant in such a case was entitled to the protection, this Court observed at page 192 as follows:

> "A tenancy may come to an end for a number of reasons, as for instance denial of landlord's title. Such a denial under the ordinary law of transfer of property brings about forfeiture. The argument for the appellant before us in that even such a case will be within the actual words of the third category in the definition (the third category being the persons who continued in possession after the termination of the tenancy). But there is a fallacy in the argument. When a person, who continues to be in possession after termination of tenancy, claims that he does so, as he is entitled to the property, as his own, it is obvious that there is hardly any room for such an owner to seek protection of his possession under the provisions of the Act. Clearly the Act is not intended to protect such owners, for there is no need for it. We are of the view that such a case will not fall within the third category of persons entitled to protection under the Act."

8. The decision in *D.V. Sanjeevi Naidu* v. *M.N. Chittibabu Mudaliar*[1] had been cited and has not been noticed.

9. The legal character of the person continuing to hold the property after the termination of the lease in his favour by a denial of the landlord's title in the context of the Madras City Tenants' Protection Act came up for consideration before V. Ramaswami, J., sitting singly in *R. Govindaswami* v. *Bhoopalan and others*[2]. There was a lease in favour of the tenant who failed to pay the rent. There was a notice of termination of tenancy. The tenant's defence in the suit for recovery of possession was that he had

1. (1965) 2 M.L.J. 188: I.L.R. (1966) 1 Mad. 177: 78 L.W. 281: A.I.R. 1965 Mad. 442.

1. (1953) 1 M.L.J. 260: A.I.R. 1953 Mad. 473.
2. (1977) 2 M.L.J. 206.

purchased the property under an oral sale and that he was not holding the property as a tenant. The trial Court held that the oral sale pleaded by the tenant was not true and that he was a tenant of the suit site. It was however, held that he was not entitled to an order for sale under section 9 of the Madras City Tenants' Protection Act, as the provisions were not applicable to non-residential buildings. There was a subsequent notification applying the benefit of legislation to the non-residentntial buildings also The question before this Court was whether, where the tenancy had come to an end by reason of the tenan's denial of the landlord s title, the tenant could claim, the benefit of the Madras City Tenants' Protection Act. The decision of this Court in *Veeraswamy Naicker and another* v. *Alamelu Ammal and others*[1] was cited as showing that the tenant was not protected by the Act. The learned Judge held that in view of the decision of the Supreme Court in *Damadi Lal and others* v. *Parashram and others*[2] the decision of this Court in *Veeraswamy Naicker and another* v. *Alamelu Ammal and others*[1] would not be good law.

10 In *Damadi Lal's case*,[2] the Supreme Court was concerned with the question of the rights of a tenant in possession, after the termination of his tenancy. Though in some earlier cases it was held that a person in possession after termination of the tenancy, though entitled to the statutory protection against eviction, had no estate or interest in the property and had only a personal right to remain in occupation, in *Damadi Lal's case*[2] it was held that this question whether he would be entitled to the benefit of the tenancy legislation would depend upon the provisions of the Act, under which the right is claimed by the tenant, and if the provisions showed that the tenant, even after the determination of the tenancy was treated on par with those persons who had contractual tenancy in their favour, the right of the person in possession after the determination of the tenancy was the same as a contractual tenant and that he could not be denied the right of protection under the Act. The learned Judge, therefore, held that the tenant would be entitled to the protection of Madras City Tenants' Protection Act of 1922. In view of this decision, with which I agree, it would follow that the tenant would ordinarily be entitled to the protection even if he had lost his claim for title so long as in origin there was a tenancy and so long as it could be said that he continued to be tenant in possession of the property even subsequent to the determination of the lease in his favour by reason of his denial of the landlord's title.

11. The learned counsel for the respondent contended that this principle would not be applicable to the cases where the tenancy legislation conferring certain rights came to be passed after the determination of the lease. In other words, what is sought to be argued in the present case is that the plaintiff in this case had acquired title to the property on 31st October, 1953 when the Madras Cultivating Tenants Protection Act had not been enacted. The submission was that the tenant in the present case had lost his position as a tenant in 1953 and that he could not be said to be a person, who continued to be in possession of the property after the determination of the tenancy agreement at the time Act XXV of 1955 came into force.

12. The Tamil Nadu Act of XXV of 1955 received the assent of the President on 24th September, 1955 and came into force thereafter. The definition of 'cultivating tenant" was added in the year 1958. As it originally stood, the definition ran as follows:

"Cultivating tenant" in relation to any land......

(*i*) means a person who carries on personal cultivation on such land, under a tenancy agreement, express or implied; and,

(*ii*) includes.......

(a) any such person as is referred in sub-clause (*i*) who continues in possesssion of the land after the determination of the tenancy agreement.

There was an amendment of this provision in the year 1969. The provision as amended in 1969 runs as follows:

"Cultivating tenant"..........

(*i*) means a person who contributes his own physical labour or that of any member of

1. (1965) 2 M.L.J. 188: (1966) I L.R. 1 Mad 177.
2. 1976 Crl. L.J. 1755: (1977) 3 S.C.C. 346: A.I.R. 1976 S.C. 2229.

his family in the cultivation of any land belonging to another, under a tenancy agreement, express or implied; and

(*ii*) includes......

(a) any such person who continues in possession of the land after the determination of the tenancy agreement.

13. There seems to be some substance in the contention of the learned counsel for the respondent that the Act would apply only to a person, who was a tenant at the time when the Act came into force. The Act has a preamble saying that it was enacted for the protection of cultivating tenants in certain areas in the State of Madras from unjust eviction. Therefore, for this Act to apply, at the time when the Act came into force, the appellant must have been a tenant, so that there was need for any protection to him from unjust eviction. If the appellant was not a tenant at the time when the Act came into force, he could not claim protection on the basis that he had continued in possession of the land after the determination of the tenancy agreement. Only when at the commencement of the Act he was tenant he would be a tenant who continues in possession of the land after the determination of the tenancy agreement in consequence of the denial of the landlord's title by him. But that is not the position here, as the tenancy had merged with his ownership in the year 1953. This is not one of those cases where his ownership is itself in dispute During the priod between 31st October, 1953, and 9th December, 1969 there is no dispute about his being the owner of the property. The only question was whether he was entitled to claim ownership subsequent to that date. He could not maintain his ownership after the date, as the vendor had only a life interest in the property which determined on her death. The result is that he would not be entitled to the protection under the Act.

14. Section 4 of the Act provides for restoration of possession to any cultivating tenant, who was in possession of the land on 1st December, 1953 and who was not in possession thereof at the commencement of the Act. Such a person could apply under section 4 to the Revenue Divisional Officer for restoration of his possession on the same terms as those applicable to the possession of the land on the 1st December. 1953. This provision also shows that the Act contemplated cases of possession by cultivating tenant only retrospectively upto 1st December 1953. In this case, the sale deed in favour of the plaintiff was prior to 1st December, 1953 *i.e.*, on 31st October, 1953 Therefore, it would be unreasonable to give any further retrospective operation to the provision of the statute and grant him protection, as if the Act was in force on or before 31st October, 1953. In *Annamalai Goundan* v. *Venkatasami Naidu and others*[1] after the expiry of the period of the lease a registered agreement was entered into between the parties under which the properties were sold to the lessee. The balance of consideration due to the vendor was tendered, but the landlord declined to accept it. Hence a sale deed could not be and was not executed. The landlord applied for eviction under the Cultivating Tenants Protection Act. The question was whether the landlord was entitled to evict such a person. It was held that the moment possession was taken under the contract of sale, the original relationship of landlord and tenant ceased to exist and that the landlord could not take advantage of the provisions of the Tamil Nadu Act XXV of 1955 and file an application for eviction. It was also held that it was not open to the landlord to contend that the right of possession claimed by the vendee was referable to the contract of lease after the contract of sale was partly performed. It was contended on the basis of this decision, for the respondent herein that the relationship of landlord and tenant got terminated immediately after 31st October, 1953, in the present case and, that, therefore, there was no tenancy at all thereafter. However in that decision it was not necessary to go into the question whether the person could be covered by the expression 'cultivating tenant', if he was in possession of the property after the determination of the lease in his favour. I do not, therefore, consider that this decision has any application to the case on hand. But that does not in any way affect the decision given above *viz.*, that the appellant was not a tenant of the suit property when Act XXV of 1955 came into force, and was not entitled to claim any tenancy right.

15 Assuming that he is entitled to the protection of Act of XXV 1955, the second question that arises for determination in this case may be examined *i.e*, whether the plea that

1. (1959) I M.L.J. 301: 72 L.W. 265: I L.R. (1959) Mad. 796: A.I.R. 1959 Mad. 354.

he is a 'cultivating tenant' is barred by *res judicata*. The earlier suit between the same parties was for declaration, possession and mesne profits. There was a decree in favour of Kandammal's husband, that is the defendant herein, and the decree has been affirmed on appeal. There was no second appeal against that decision. At no stage in those proceedings, the plaintiff herein put forward any claim that he was a 'cultivating tenant.' It cannot be disputed that he could have put forward such a claim as an alternative defence to the prayer for possession, in the prior proceedings, which he did not. A matter which might and ought to have been made ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit and the provisions of section 11 of the Code of Civil Procedure read, with *Explanation IV* thereof, would, therefore, apply. The learned counsel for the appellant submitted that the plea of *res judicata* would have no force in the present case, as the result of Act XXV of 1955 was only to prevent any decree for possession being executed. Section 3 (1) of that Act provides that no cultivating tenant shall be evicted from his holding by or at the instance of the landlord, whether in execution of a decree or order of a Court or otherwise except in the manner provided under that Act. Therefore, even assuming that the defendant-respondent had a decree in his favour, it is urged that the decree could not be executed, and the plea of *res judicata* has no scope for application in the present case. I am unable to agree with this submission. It is true that section 3 (1) prohibits eviction at the instance of the landlord in execution of a decree of a Court. However, the plea of his being a cultivating tenant should have been taken in the earlier proceedings. There is already a decree in favour of the defendant-respondent. That decree cannot be collaterally attacked in the present proceedings. The present suit has come to be filed only because that decree could not be challenged or otherwise resisted in the course of the execution proceedings. This is, therefore, an attempt to set at naught that decree by filing a separate suit. If this plea had been taken in the earlier suit, it would have been suitably adjudicated upon. As the plaintiff did not in those proceedings take up this plea, it is too late in the day for him to take up such a plea, by filing the present suit. The whole scheme behind section 11 of the Code of Civil Procedure, is to avoid multiplicity of proceedings and the scheme will be set at naught if he is permitted to put forward such a plea at this stage.

16. The result is, the Court below was justified in holding that the plaintiff was barred by *res judicata* from putting forward his plea based on his being a cultivating tenant. The appeal is dismissed. There will be no order as to costs.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Nagapattinam Permanent Fund Limited by its Secretary.

.. *Appellant (Respondent-plaintiff)**

v.

N. Thirunavukkarasu Mudaliar

.. *Respondent (Petitioner-Defendant).*

Tamil Nadu Debt Relief Act (XXXVIII of 1972), *section* 3 (h), *sub clauses* (A) *to* (F) — *Debt owed to public companies as defined by the Companies Act—Such debts excluded from the purview of the Tamil Nadu Debt Relief Act.*

The Tamil Nadu Debt Relief Act, 1972 was enacted to grant the debtors in Tamil Nadu the benefit of scaling down their debts. Certain categories of debts, however, were not to get that statutory relief. These excepted categories are mentioned in the very forefront of the Act, in section 3 under eight clauses (*a*) to (*h*). Clause (*h*), in particular contains six categories under sub-clauses (*A*) to (*F*). The debts mentioned in these clauses are not eligible for relief under the Act, and they could not be scaled down. [*Para.* 2.].

In the present case the appellant was directly covered by the exception enacted in sub-clause (*A*) of clause (*h*) of section 3, because the appellant is a public company as defined under the Companies Act, 1956. When it is found that sub-clause (*A*) applies, the eye need look no further to find out if the appellant comes under any other sub-clause of clause (*h*). The two sub-clauses (*A*) and (*B*) not to speak of the other sub-clauses in clause (*h*) are

*A.A.O. No. 77 of 1976. *24th August,* 1978.

all of equal status. All are enumerated exceptions enacted under the statute They are by no means mutually exclusive although each might turn on its own orbit, as it were. The result is that the moment any given debt falls under some particular sub-clause or clause in section 3 it is to be understood that the end of the enquiry is reached. To travel beyond indeed, would be quite a wasteful quest.

[*Paras* 8 *and* 9.]

Appeal against the order of the District Judge, East Thanjavur at Nagapattinam in C.M.A. No. 199 of 1974 preferred against the order of the Court of the District Munsif, Nagapattinam in I.A. No. 1155 of 1973 in Original Suit No. 88 of 1971.

R. Krishnamurthy, D. Raju and *A.R. Lakshmanan*, for Appellant.

V. Muthuperumal, for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises a point of interpretation concerning the Tamil Nadu Debt Relief Act, 1972.

2. The Act was enacted by the State Legislature to grant to debtors in this State the benefit of scaling down their debts. Certain categories of debts, however, were not to get this statutory relief. These excepted categories were mentioned in the very forefront of the Act in section 3, under eight clauses (*a*) to (*h*). Clause (*h*), in particular contained six subcategories, under sub-clauses, (*A*) to (*F*). The debts mentioned in these clauses and sub-clauses were not eligible for relief under the Act; they could not be scaled down.

3. The Nagapattinam Permanent Fund Limited, the appellant in this case, is a public limited company, carrying on business as a permanent fund. The respondent, Thirunavukkarasu Mudaliar, owned money to this fund. The appellant sued the respondent on the debt and obtained a money decree for Rs. 1,163.91 on 8th August, 1972. The respondent subseqnently applied to the Court for scaling down the decree, invoking the Tamil Nadu Debt Relief Act, 1972.

4. The appellant-company opposed the debtor's application contending that the debtor was not entitled to avail of the relief granted by the Act, because the debt in question stood excluded under sub-clause (*A*) of clause (*h*) of section 3.

5. Sub-clause (*A*) relied on by the appellant, referred to debts and liabilities owned to public companies, as defined by the Companies Act, 1956. There was no dispute that the appellant was a public company within the meaning of the Companies Act, 1956. The learned District Munsif, therefore, had no hesitation in holding that the debt in the present case stood excluded from the purview of the Tamil Nadu Debt Relief Act, 1972. He accordingly rejected the respondent's application for scaling down the decree as incompetent.

6. On appeal, however, the learned District Judge took a different view. While doing so, he did not, for one moment, say that the appellant was not a public company. Nor did he hold that the sub-clause (*A*) of clause (*h*) of section 3 did not apply to public companies. His reasoning was quite different. He treated sub-clause (*A*) of section 3 (*h*) as a mere *general* provision, as compared to sub-clause (*B*), which he regarded as a *special* provision. Sub-clause (*A*), as already noticed, referred to debts and liabilities owned to public companies as defined under the Companies Act, 1956. Sub clause (*B*), on the other hand, related to debts and liabilities owned to banking companies to which the Banking Regulation Act, 1949 applied. The learned District Judge reasoned that a special provision if it applied, would exclude a general provision. According to his judgment, among the several sub-clauses in clause (*h*) of section 3, the appellant could rely if at all, only on sub-clause (*B*), which was a special provision and not on sub-clause (*A*) which was a general provision but the learned Judge added that the appellant was not entitled to rely even on sub-clause (*B*) for the reason that the appellant had not obtained any licence from the Reserve Bank of India to do banking business The learned Judge said that a licence of that kind was necessary for a banking company in order to enable it to function as such under the Banking Regulation Act, 1949. In this view, the learned District Judge concluded that the debt in this case cannot be taken out of the purview of the Tamil Nadu Debt Relief Act, 1972.

7. The appellant canvasses the correctness of the District Judge's view. He says that the learned Judge had not understood the scheme of section 3 of the Tamil Nadu Debt Relief Act, 1972 nor the inter-relation between sub-clauses (*A*) and (*B*) of clause (*h*) of that section.

8. I think this point is well taken, as a matter of statutory construction. To decide this point, however it is not necessary to go into the larger question whether the appellant, while carrying on the business of a permanent fund, is to be treated as a banking company, and whether the appellant was bound to take out a licence from the Reserve Bank of India to enable it to carry on its business even as a permanent fund. I shall assume, for argument's sake, that the appellant fails within the definition of a banking company under the Banking Regulation Act, 1949. I shall further assume that the appellant must be regarded as carrying on banking business in contravention of the law in so far as the appellant had not armed itself with the requisite licence from the Reserve Bank. On these assumptions, the question still would be whether the appellant can claim that the decree debt owed to it by the respondent is not covered by the Tamil Nadu Debt Relief Act, 1972, but stands excluded from its purview, under sub-clauses (*A*) and (*B*) of clause (*h*) of section 3, because the appellant is a public company as defined under the Companies Act, 1956. When it is found that sub-clause (A) applies, the eye need look no further to find out if the appellant comes under any other sub-clause of clause (*h*).

9. I do not accept the District Judge's distinction that sub-clause (*A*) is a "general" provision and, (*B*) a "special provision". These two sub-clauses, not to speak of the other sub-clauses in clause (*h*) are all of equal status. All are enumerated exceptions enacted under the statute. They are by no means mutually exclusive although each might turn in its own orbit, as it were. The result is that the moment we find, on examination, that any given debt falls under some particular sub-clause or clause in section 3, we must know that we have reached the end of our inquiry. We do not have to travel beyond to find out what the position might be under any other sub-clause or clause of section 3. That, indeed, would be quite a wasteful quest.

10. The learned District Judge almost placed the appellant on the horns of a diemma when he said that the appellant cannot claim under sub-clause (*A*) because it has got to claim only under sub-clause (*B*) and it cannot claim under sub-clause (*B*) because it is not possessed of a banking licence. This argument, in my judgment, ignores the elementary fact of the appellant's incorporation. Let us assume that want of banking licence from the Reserve Bank would disqualify the appellant from being a banking company. But that would only be a disqualification under the Banking Regulation Act, 1949. It cannot undermine the appellant's undoubted corporate identity as a public company under the Companies Act, 1956. When thus the appellant is comprehended within the coverage of sub-clause (*A*), it matters not that the appellant is put out of sub-clause (*B*).

11. I allow this appeal for the reasons stated above. This means that the learned District Judge's, order is not aside and the District Munsif's order is restored. There will be no order as to costs.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

D. Rajapathi .. *Appellant**

v.

The University of Madurai, represented by the Registrar and others

.. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 95—*Jeep belonging to Madurai University—Driven by driver an employee of State Government—Assistant Engineer belonging to State Government travelling by the jeep —Jeep involved in accident—Assistant Engineer injured—Disability in his right hand—Claim for damages against Madurai University, driver of the Jeep and the Insurance Company—Jeep, not a public carrier though owned by a public body—University held not liable—Insurance company also held not liable.*

The University of Madurai had obtained the State Government's permission to raise buildings for staff quarters at Madurai. The construction and supervision of the work were with the Directorate of Technical Education, Madras, a department of the State Government, *R* who was an Assistant Engineer in the Public Works Department, Madras, was supervising the construction work. On inspection work, *R* was given the jeep belonging to the University. The driver of the jeep however was an employee of the State Govern-

*A.A.O. No. 91 of 1975. *29th March*, 1979.

ment under the control of the Director of Technical Education, Madras. One day the jeep met with an accident while on duty. *R* was injured. The accident left him with a disability in his right hand *R* moved the Motor Accidents Tribunal for compensation against the; (*i*) Madurai University as owner of the jeep; (*ii*) the driver of the jeep; and (*iii*) the insurance company who had covered third party risks for the vehicle. *R* did not implead the State Government or the Directorate of Technical Education as the employer of the jeep driver. The Claims Tribunal computed the compensation at Rs. 9,734 and held that the University and the insurance company were not liable. The award was made against the jeep driver alone. On appeal, by *R* seeking to make the University and the insurance company liable;

Held: The University, albeit the owner of the jeep, could not be rendered liable to pay compensation for injuries caused by the negligence of the driver who was not the University's servant but the State Government's. [*Para.* 10.]

The doctrine of *respondeat superior* or vicarious liability cannot be extended to a case where the negligence was of a driver employed by an independent contractor. The appellant had not impleaded the right party, namely, the State Government on whom he could enforce the vicarious liability. [*Para.* 10.]

The jeep, in this case, could not be brought within the conception of a public carrier vehicle within the meaning of section 95 (1) (*b*) (ii) of the Motor Vehicles Act. Although owned by a public body like a University, the jeep was only their own private vehicle. As a passenger in that vehicle, therefore, the appellant could not seek to demand compensation from the insurance company, having regard to the terms of section 95 (1) of the Act. [*Para.* 13.]

Case referred to:—

Pushpabai Purshottam Udeshi v *M/s. Ranjit Ginning and Pressing Company (P.) Ltd.*, (1977) 2 S.C.J. 442: (1977) 2 S.C.C. 745: 1977 A.C.J. 343: A.I.R. 1977 S.C. 1735.

Appeal against the order of the Motor Accidents Claims Tribunal (Subordinate Judge), Tiruchirapalli, dated 1st November, 1979 and made in M.A.C.T.O.P. No. 97 of 1971.

Kumar Rajaratnam, for Appellant

R Thiagarajan, *S. Palaniswami*, *K.C. Srinivasan* and *K.S. Narasimhan*, for Respondents.

The Court made the following

ORDER.—The facts giving rise to this civil miscellaneous appeal may be briefly stated.

2. The University of Madurai had obtained the State Government's permission to raise buildings for staff quarters at Madurai. The actual work of construction of the buildings and their supervision were with the Directorate of Technical Education, Technical Division, Madras which is a Department of the State, Government. Rajapathi, the appellant in this civil miscellaneous appeal, is an Assistant Engineer, Public Works Department, Madras. It was part of his duty to supervise the construction of the staff quarters in the Madurai University, for he was attached, in that capacity, to the office of the Directorate of Technical Education. For going on official inspection duty, the appellant was given the use of a jeep belonging to the University The driver of the jeep, however, was an employee of the State Government under the control of the Director of Technical Education, Madras.

3. One day at about 7 A.M., the appellant travelled in this jeep to go to some place in connection with his inspection duty. The vehicle was driven by the Deparment's driver. On the way, the vehicle met with an accident. The appellant fell from the jeep and sustained injuries. He was treated in a hospital as an inpatient. The accident left him with a disability in his right hand.

4. The appellant thereupon moved the Motor Accidents Tribunal, Tiruchirapalli for compensation under different heads such as medical expenses for treatment of the injury, pain and suffering loss of earnings etc He sought to make liable: (*i*) the Madurai University who was the owner of the jeep; (*ii*) the driver of the jeep, and (*iii*) the insurance company who had covered third party risks for the vehicle. These were the only respondents to the appellant's claim application before the Tribunal. The appellant did not implead or seek any relief against the State Government or the Directorate of Technical Education as the employer of the jeep driver.

5. The Claims Tribunal on inquiry found that the accident occurred owing to the negligence

of the jeep driver. The Tribunal computed the quantum of compensation at Rs 9,734 in the aggregate under the several heads under which damages were claimed. The Tribunal held that the appellant was entitled to this amount. In fixing the liability for payment, however, the Tribunal held that the University and the Insurance company were not liable. The award was made as against the jeep-driver alone.

6. In making the award in the manner aforesaid the Tribunal accepted the University's contention to the effect that the jeep driver was not their employee, but a servant of the State Goverment, and hence they cannot be made liable for damages on any principle of vicarious liability, even though the vehicle which was involved in the accident belonged to them. The question was posed before the Tribunal as to whether the Directorate of Technical Education was an agent of the University, so that the fault of the driver may be visited on the University as that of the agent's servant. The Tribunal, however, held that the Directorate of Technical Education was not the University's agent, but quite an independent contractor. On the basis of this finding the Tribunal also dismissed the appellant's claim against the insurance company.

7. In this appeal, the appellant challenges the correctness of the Tribunal's finding as to the jural relationship between the Madurai University and the Directorate of Technical Education. This question in a mixed question of fact and law, which means that on the factual findings the proper legal inference has to be drawn. A few repoted cases were cited in the course of argument, but the basic question whether the Directorate of Technical Education is the University's agent or an independent contractor has to be determined primarily on facts. The evidence before the Tribunal was that the construction of buildings was done purely on the responsibility of the State Government The tender calling for construction contract was issued by the Directorate of Technical Education, Construction Wing, which is a department of the Government of Tamil Nadu. The actual supervision of construction work was fully retained with that Directorate as its responsibility. The jeep driver as well as the technical and supervising staff, including the appellant, were all employees of the State Government answerable to the Directorate of Technical Education. They were not University emplopees, nor were their service lent to the University even for the duration. The jeep in question, no doubt, belonged to the University but it was left fully under the control of the Directorate of Technical Education. The petrol, bills and minor repair bills were all being paid by the Government Department. In these circumstances, I must fully endorse the Tribunal's finding that the Directorate of Technical Education had merely undertaken to build an administrative block in the University of Madurai, independent of any control or interference from that University.

8. The test applied by the law to find whether some one is an agent of another or is an independent contractor is to find out whether there is any degree of control by the one over the other. In this case there was no control of any such kind.

9. One of the cases cited in argument was *Govindarajulu* v. *Govindaraja*[1] a decision of a division bench of this Court. In that case, a lorry was entrusted by its owner to an automobile workshop for repairs. A mechanic employed by the workshop-proprietor took out the vehicle for a trial run, when it got involved in an accident. The injured third party sought to make the lorry-owner liable for the negligence of the garge mechanic. It was held that the relationship between the lorry-owner and the workshop-proprietor to whom it was entrusted for repairs was that of independent contractors and not that of a master and servant or principal and agent.

10. Following the principle of this decision, but primarily taking a firm stand on the facts disclosed by the evidence in this case, I must hold that the University, *albeit* the owner of the jeep, cannot be rendered liable to pay compensation for injuries caused by the negligence of the driver who was not the University's servant but the State Government's. The principle of *respondeat superior* or vicarious liability can be applied to a vehicle-owner where the negligence is that of the owner's servant or of the servant of owner's agent. The doctrine cannot be extended and applied to a case where the negligence is that of a driver employed by an independent contractor. In the present case, the appellant had not impleaded the right party namely the State Government on whom he could

1. A.I.R. 1966 Mad. 332.

enforce vicarious liability. The negligence is that of a driver employed by an independent contractor. In the present case, the appellant had not impleaded the right party namely the State Government on whom he could enforce vicarious liability.

11. The correctness of the Tribunal's decision absolving the insurance company from liability was also questioned in this appeal. This point falls to be determined on the terms of section 95 of the Motor Vehicles Act, 1939. As a general rule, the insurance company's liability for third party risks is severely restricted under section 95 to the death of or bodily injury to a third party, or to property of the third party not exceeding Rs. 2,000 in value. A third party is not defined by the Act in clear terms. The statute merely carries an inclusive definition just to say that a third party includes a Government. But this is no definition at all. It does not help us in any way to find out whether a passenger in a motor vehicle is a third party within the meaning of the Motor Vehicles Act.

12. The question in the present case is whether the appellant who travelled in the jeep as a passenger can be regarded as a third party so as to brought within the insurance coverage. A look at section 95 of the Act which deals with the ambit of third party risks insurance shows that the Legislature has made an express provision in clause (1) (*b*) (ii) of that section specifically referring to the covering of risks of passengers. But the reference to passengers, even in this clause, is limited, in terms, only to passengers in public carriage vehicles. The obvious inference is that the Legisature was minded to protect only the lives and limbs of passengers in public carriage vehicles under the system of third party insurance, and not any other class of passengers. This is based on the well-known canon of statutory construction *expressio univs estexclusio alterius*. This position is, now settled by a decision of the Supreme Court in *Pushpabai Purshottam Udeshi* v. *M/s. Ranjit Ginning and Pressing Co.*[1].

13. The jeep in this case cannot be brought within the conception of a public carrier vehicle within the meaning of section 95 (1) (*b*) (ii) Although owned by a public body like a University, the jeep is only their own private vehicle. As a passenger in that vehicle, therefore, the appellant cannot seek to demand compensation from the insurance company having regard to the terms of section 95 (1) of the Act.

14. In the result, this appeal is dismissed and the award of the Tribunal is confirmed. There will, however, be no order as to costs.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

Neelavarma Iyer (died) and others .. *Petitioners**

v.

Srinivasa Iyer .. *Respondent.*

Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), sections 54 (F) and 64 (c)—One T *possessed of Inam villages as a life estate holder—Inam villages taken over by covernment under the Act—Compensation deposited by Government with Tribunal—Claim to the Compensation amount by one* 'S' *on the basis of a settlement deed executed by* 'T'*—Payment to* 'S' *of the compensation money after due enquiry—No appeal against that order—Disputes between* S *and* N *another claimant under an alleged will of* 'T'*—Civil suit by* 'N' *for a declaration to suceeed to the estate of* 'T' *on the basis of the will—Suit dismissed but decreed in second appeal by the High Court—Petition by* 'N' *to the Tribunal to direct* 'S' *to re-deposit the money withdrawn—Petition whether maintainable—Finality of the earlier order for payment.*

The Tribunal under the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act is powerless to go behind its own order and to call back the amount it had paid earlier to the respondent. Section 144 of the Code of Civil Procedure cannot be applied to the facts of this case. Apart from the question as to whether section 144 of the Code of Civil Procedure, is applicable to the Tribunal or not, there is no question of the decision of the Tribunal being reversed so as to enable the petitioner to claim the amount which were already paid to the respondent by the Tribunal on the

1. 1977 A.C.J. 343: (1977) 2 S.C.J. 442; (1977) 2 S.C.C. 745: A.I.R. 1977 S.C. 1735.

*C.R.P. Nos. 1492, 1498, 1502 and 1509 of 1975. 19th January, 1979.

ground of restitution. Section 54 (F) confers no power on the Tribunal, either a power of review or a power to rectify a mistake in its earlier order or to act independently to call back the amounts which it had already paid to a particular person after due enquiry under section 53. [*Para*. 5.]

Even if the Tribunal has passed an erroneous order and has directed payment of the compensation to persons who are not entitled to receive the same, such orders cannot be said to be null and void. As a matter of fact, section 64 (*c*) gives a finality to the orders passed by the the Tribunal. Admittedly the earlier orders passed by the Tribunal directing the payment of compensation, to the respondent had not been successfully challenged by filing appeals before the Special Tribunal. Therefore the earlier orders passed by the Tribunal directing the payment of the amount of compensation have become final under section 64 (*c*). In view of this position unless the statute specifically enables the Tribunal before whom the present application for redeposit has been filed to set aside its earlier orders and to reopen the proceedings, the Tribunal is powerless to entertain the petitions filed by the petitioner or issue direction to the respondent to redeposit the amount. So long as the earlier order of the Tribunal stands and has recorded a finality under the provisions of the Act, there is no quesion of the Tribunal directing the redeposit of the amount paid to the respondent ignoring its earlier order. [*Para*. 7.]

It has been uniformly held by the High Court that the provisions of the Act do not confer any such review power to the Tribunal. Therefore section 54 (F) has to be understood at not conferring any review power to the Tribunal. Apart from this, the language adopted in section 54 (F) does not also indicate that the Legislature intended to confer a power on the Tribunal to recall the amount paid to the claimant after enquiry and to consider the question of disbursement again. [*Para*. 8.]

Cases referred to:—

Nanja Raja v. *Lalitha Ammal*, (1960) 1 M.L.J. 415: (1960) L. W. 67: I L R. (1960) Mad. 397; *Mayilsami Gounder* v. *Ramamoorthi*, (1970) 1 M.L.J. 606.

Petition under section 227 of the Constitution of India, praying the High Court to revise the order of the District Judge, Madurai (Estate Abolition Tribunal) dated 23rd December, 1974 and made in O.P.Nos. 13, 16, 14 and 15 of 1972.

V. Krishnan, for Petitioners.

N Venugopal Nayagar and *K. Alagiriswami*, for Respondent.

The Court made the following

ORDER.—One Thirnvenkadathammal was possessed of certain inam villages as life estate holder which were taken over under the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act, 1948. In respect of those inam villages, advance compensation had been deposited by the State Government under section 41 of the Act with the Estates Abolition Tribunal, Madurai. On a claim made by the respondent who is the same in all these petitions, the amounts were paid out to him by the Tribunal after due enquiry, under section 53. The claim before the Tribunal by the respondent was that he is entitled to compensation on the basis of a settlement deed executed by the service inam holder, Thiruvenkadathammal.

2. Thereafter disputes arose between the respondent and the petitioner herein as to who is entitled to succeed to the estate held by Thiruvenkadathammal. The petitioner claimed that under the will of Thiruvenkadathammal he is entitled to succeed to her estate and that the respondent cannot claim any interest on the basis of the alleged settlement deed said to have been executed by her. Since the respondent disputed the claim put forward by the petitioner, the latter filed O. S. No. 33 of 1962 on the file of the District Munsif's Courts, Madurai for a declaration of his right to succeed to the estate of Thiruvenkadathammal on the basis of the will executed by her in his favour Though that suit was dismissed by the trial Court, there was an appeal against that judgment in A. S. No. 255 of 1965 on the file of the Sub-Court, Madurai. In that appeal, the petitioner succeeded in establishing his claim on the basis of the will set up by him to succeed to the estate of Thiruvenkadathammal as against the respondent. The respondent took the matter in Second Appeal No 830 of 1966 to this Court which, however, failed The result of these proceedings is that the petitioner has been declared as successor to the estate of Thiruvenkadathammal as against the respondent.

3. Subsequent to his succeeding in the civil suit wherein he got a declaration that he is entitled to succeed to the estate of Thiruvenkadathammal, the petitioner filed four O. Ps., before the Estates Abolition Tribunal for directions to the respondent to redeposit the amounts earlier withdrawn by him, purporting to be under section 54 (F) of the Act read with section 144 of the Code of Civil Procedure. The case put forward by the petitioner before the Tribunal for redeposit of the sums drawn by the respondent is that he has been declared by the civil Court to be entitled to succeed to the estate of Thiruvenkadathammal and that therefore the advance compensation amounts which have been wrongly paid to the respondent should be directed to be redeposited to the credit of O P. No. 691 of 1952. The said petitions were opposed by the respondent on the ground that such petitions are not maintainable in law. After hearing the arguments of the counsel on the preliminay point as to the maintainability of the petitions, the Tribunal held that since it has no power to review its own earlier orders directing payment out of the amounts to the respondent, the petitions for redeposit cannot be maintained. The orders passed by the Tribunal have been challenged in these revision petitions.

4 According to the learned counsel for the petitioner the Tribunal is in error in holding that the petitions for redeposit are not maintainable and that, though the Tribunal has no power of review as has been held by this Court in *Nanja Raja v. Lalitha Ammal*[1] still the Tribunal can act under section 54 (F) which specifically deals with a situation where payments have been made by the Tribunal to a wrong person, and says that the amounts wrongly paid can be recovered as arrears of land revenue. According to the learned counsel the object of section 54 (F) stands completely defeated if the Tribunal denies itself the power to call back the amount which it has paid to a wrong person. The question is whether this contention of the learned counsel for the petitioner can be accepted as sustainable.

5. The learned counsel does not dispute the legal position that the Tribunal does not have the power to review its own orders as there is no specific power of review conferred on it under the provisions of Tamil Nadu Act XXVI of 1948. As a matter of fact, there are at least two decisions of this Court, one in *Nanja Raja v. Lalitha Ammal*[1] and another in *Mayilsami Gounde v. Ramamoorthi*[2] specifically holding the Tribunal has no power of review as the provisions of the Act do not confer a power of review on the Tribunal. Therefore it is clear that the Tribunal is powerless to go behind its own order and to call back the amount it had paid earlier to the respondent. It is also equally clear that section 144 of the Code of Civil Procedure, cannot be applied to the facts of this case. Apart from the question as to whether section 144 of the Code of Civil Procedure, is applicable to the Tribunal or not, there is no question of the decision of the Tribunal being reversed so as to enable the petitioner to claim the amounts which were already paid to the respondent by the Tribunal on the ground of restitution.

6. The only question then to be considered is whether the Tribunal can act under section 54 (F) of the Act and direct the respondent to redeposit the amounts which were wrongly paid to him. On a due consideration of the matter, I am inclined to take the view that section 54 (F) cannot be taken to confer on the Tribunal either a power of review or a power to rectify a mistake in its earlier order or to act independently to call back the amounts which it had already paid to a particular person after due enquiry under section 53. It cannot be disputed that the provisions of the Act deal specifically with the manner of payment of advance compensation. Section 40 of the Act prescribes the manner in which the compensation payable to any person under the Act may be paid. Section 41 directs that the Government shall deposit the compensation in respect of each estate which has been taken over under the Act, in the office of the Tribunal. Section 43 enjoins on the Tribunal to conduct enquiry as to the person to whom the compensation amount is payable or as to the persons between whom it should be apportioned. Such determination by the Tribunal is made the subject of an appeal before a Special Tribunal under section 51. Section 53 deals with the disbursement of compensation as per the directions of the Tribunal. The same procedure has to be adopted in the matter of payment of advance compensation as well. The payment of advance compensation is dealt with under sections 54-A to 54-H.

7. In this case, after following the procedure set out above, the Tribunal, had paid the

1. (1960) 1 M.L.J. 415: I.L.R. (1960) Mad. 397: 1960 L.W. 97.

1. (1960) 1 M.L.J. 415: I.L.R. (1960) Mad. 397: (1960) L.W. 97.
2. (1970) 1 M.L.J. 606.

amounts to the respondent in the earlier proceedings. Now it is found that the respondent is not the person actually entitled to receive the said sum from the Tribunal and that the petitioner is the person justly entitled to receive the same as per the decision of the civil Court. As already pointed out, the provisions of the Act do not confer any power on the Tribunal to review its own order. Therefore, even if the Tribunal has passed erroneous orders and has directed payment of the compensation to persons who are not entitled to receive the same, such orders cannot be said to be null and void. As a matter of fact, section 64 (c) clearly gives a finality to the order passed by the Tribunal. Section 64 (c) says that any order passed by an authority in respect of matters to be determined by it for the purpose of this Act shall be final subject only to any appeal or revision provided by or under the Act. Admittedly, the earlier orders passed by the Tribunal directing the payment of the compensation to the respondent had not been successfully challenged by filing appeals before the Special Tribunal. Therefore the earlier orders passed by the Tribunal directing the payment of the amount of compensation to the respondent have become final under section 64-(c . In view of this position, unless the statute specifically enables the Tribunal before whom the present applications for re-deposit have been filed to set aside its earlier orders and to reopen the proceedings, the Tribunal is powerless to entertain these petitions filed by the petitioner for a direction to the respondent to redeposit the amount. So long as the earlier order of the Tribunal, stands and has reached a finality under the provisions of the Act, there is no question of the Tribunal directing the redeposit of the amount paid to the respondent ignoring its earlier order.

8. It cannot be disputed that section 54-F of the Act cannot be interpreted in isolation and that the scope of that section has to be understood in the light of the other provisions of the Act which have already been referred to. If section 54-F is understood as conferring a power on the Tribunal to rectify the mistake in paying the amount to the respondent and to call back the amount from him, then that section should be taken to confer a power of review on the Tribunal. But it has been uniformly held by the Court that the provisions of the Act do not confer any such review power to the Tribunal. Therefore section 54 F has to be understood as not conferring any review power on the Tribunal. Apart from this, the language adopted in section 54 *F* does not also indicate that the Legislature intended to confer a power on the Tribunal to recall the amount paid to a claimant after due enquiry and to consider the question of disbursement once again. Section 54-F says that where any payment made to any person is subsequently found to be not due to him, the amount which is found to be not due shall be recoverable as if it were an arrear of land revenue. Though the language adopted in section 54-F appears to be somewhat wide so as to cover all payments made under the Act, it is not possible for the Tribunal to apply section 54-F and call back the amount which it had already paid to certain claimants after due enquiry. If section 54-F has to be understood as being subject to the other provisions of the Act, then it can be applied only in cases of wrong payment made by the Government or the other authorities under the Act excluding the Tribunal as otherwise it will lead to an anomaly where the payment has been made by the Tribunal to a claimant after due enquiry, the Government in exercise of the power under section 54-F can, if it is of the opinion that a payment has been made to a wrong person, call upon the person who has been paid the compensation to refund the same for proper disbursement. This will lead to the situation where the Government while exercising the power under section 54-F will automatically become the appellate or revisional authority over the orders of the Tribunal. That is contrary to the scheme of the Act. The Tribunal is independent of the Government or the other authorities prescribed under the Act and therefore section 54-F cannot be understood in the sense that it can be invoked even when the payment has been made by the Tribunal to a claimant after due enquiry. In this view of the matter, I cannot accept the contention put forward by the petitioner in these cases.

9. The petitions are therefore dismissed. No costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*T. Ramaprasada Rao, CJ., and G. Ramanujam, J.*

The Peddanaicken Palayam Co-operative Agricultural Bank Ltd, represented by its President T. Shanmugham .. *Petitioner**

v.

The Government of Tamil Nadu represented by its Special Secretary, Co-operative Department, Fort St. George, Madras-9 and others .. *Respondents.*

(A) *Tamil Nadu Co operative Societies Act (LIII of* 1961), *section* 26 *and the Tamil Nadu Co-operative Societies Rules* (1963) *—Introduction of Chapter IX-B of the Act by the Tamil Nadu Co-operative Societies (Third Amendment) Act,* 1970, *section* 73-*J and introduction of rule* 85-*NA by reason of the induction of Chapter IX-B—Applicability to Central Co-operative Banks—Whether illegal and invalid and violative of the rights guaranteed under Article* 19 (1) (c), *Constitution of India* (1950).

(B) *Constitution of India* (1950), *Article* 19 (1) (b).

The petitioner, president of a Bank registered under the provisions of the Tamil Nadu Co-operative Societies Act and shareholder member of a Central Bank sought a writ of declaration that section 73-J introduced into the Tamil Nadu Co-operative Societies Act is inoperative and Rule 85-NA read with the section is invalid as offending the constitutional guarantee given to the petitioner under Article 19 (1) (*c*) of the Constitution. It was contended that section 73-J in empowering the Government to appoint the Managing Director without option to the Board of Directors to elect him violated Art. 19 (1) (c) and that rule 85 NA would in effect tend to deprive the elected members of the Board of their right to administer the affairs of the Society.

Held: To achieve the object set out in the statement of objects and reasons as also the main objective which is reflected in the preamble to the Act, which is to facilitate the formation and working of co-operative societies for the promotion of thrift, self-help and mutual aid among persons with common economic needs, so as to bring about improvement in agriculture and industry, better methods of production, etc., of the Tamil Nadu Co-operative Societies Act Chapter IX-B was introduced. If, therefore, the intendment of the Legislature in introducing the new Chapter was to further the objective of the statute itself and to give an impetus to apex societies to have a blue-print of their own and plans for development, and contemporaneously give their assistance by way of guarantee or pragmatic financial help, and if section 73-J provides for the appointment of a Managing Director, who would be *ex officio* a member of the Board, there cannot be any complaint at all. [*Para.* 7.]

The provisions of the Act show that the Managing Director, though having an overall control, of the day-to-day administration of the Bank, is one who shall carry into effect the resolutions of the Committee, which consists of eight members of whom six are elected members and two are nominated by the Government. One such nominated member is the Managing Director appointed under rule 85-NA, consequent upon the induction of section 73-J in Chapter IX-B of the Act. If, therefore, the Managing Director is to effectively implement the resolutions of the Committee, which, *ex facie,* have the voting majority, to decide on matters concerning the society, it would be idle for the petitioner to contend that the Managing Director has usurped the place of the Board as such and that there is an apprehension that he would see to it that his views and directions prevail over those of the Board and its members. No specific complaint has been made and no illustrative grievance has been set out in the pleadings, and the bare apprehension, that the Managing Director is likely to behave like an arbiter for himself without reference to the Board, stands merely as a bare apprehension without further proof thereof. There is intrinsic evidence in the text of rule 85-NA to show that the Managing Director should act in accordance with the wishes or the resolutions of the Committee. So far as loan applications are concerned, which obviously form the major part of the trading activity of the Society, he could not scrutinise, but he is obliged to place them before the executive committee for sanction. This is a sure indicia that the appointment of the Managing Director is only a step-in-aid to assist the Board in the normal and proper discharge of its functions and to safeguard the interests of the State Government, who, by necessity, have got themselves involved in the activities, of the Society in public interest.

*W.P. No. 6753 of 1973. *21st November,* 1978.

We have already referred to the statement of objects and reasons, which says that it was considered desirable that the extent of the liability of the State should be subject to the control of the State Legislature and that the apex institutions should have a statutory recognition and status. In order to achieve this and to provide themselves with a shield of supervision over the Board and to ensure that everything is all right in the matter of the treatment of the subjects which come up for discussion before the Board and such resolutions are in accordance with law, a Managing Director of the choice of the State Government which is intricately involved in the administration of such societies, was thought of. Here again such co-operative societies are formed for the promotion of thrift, self-help and mutual aid among persons of common economic needs and for the development of the community at large. Public interest thus being well served by such a co-operative movement the appointment of a managing director to assist the Board and to see that the affairs of the Board are properly performed in accordance with law and to subserve the community at large, cannot be said to be an activity which has an impact on Article 19 (1) (*c*) of the Constitution at all. [*Para.* 8.]

Article 19 (1) (*c*) of the Constitution no doubt guarantees to every citizen the freedom to form associations or unions. No complaint is made that either section 73 J or rule 85-NA prevented the forming of such an association as contemplated in Article 19 (1) (*c*) of the Constitution. The fundamental rights guaranted under Article 19 (1) (*c*) have to be viewed with reference to the facts of the particular case to find out whether the challenges against any particular order of the State make an impact or impinge upon the exercise of such a fundamental right or the acquisition of such right. [*Para.* 9.]

Held, that the provision contained in section 73-J and rule 85-NA have been validly enacted and do not violate Article 19 (1) (*c*) of the Constitution

Cases referred to:—

Karibasappa v. *State of Mysore*, (1973) 2 Mys.L.J. 43; *Damayanti* v. *Union of India*, (1971) 3 S.C.R. 840: A.I.R. 1971 S.C. 966.

Petition under Article 226 of the Constitution of India, praying t at in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issu a writ or declaration calling for the record declaring section 73-J of the Co-operative Societies Act of 1971 in so far as it related to appointment of Managing Director and rule 85 N.A. of the Tamil Nadu Co-operative Societies Rules, 1963, as unconstitutional and void and infringing the rights guranteed under article 19 (1) (*c*) of the Constitution of India and infringing the provisions of section 26 of the Tamil Nadu Co-operative Societies Act.

G. Venkataraman, for Petitioner.

The Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—The writ petition is filed by the President of the Peddanaicken Palayam Co operative Agricultural Bank Limited. After enumerating the various powers enjoyed by the Bank under the provisions of the Tamil Nadu Co-operative Societies Act, reference is made to the fact that the management and administration of the third respondent (Salem Co-operative Central Bank), of whom the petitioner is one of the shareholder-members, vests in the general body of its members, and that the general body is empowered to constitute a Committee for the purpose of entrusting the management of the affairs of the Society to such nominees of theirs. As the Society has been registered under the provisions of the Tamil Nadu Co-operative Societies Act, it is a body corporate with power to hold property and do all things necessary for the purpose for which it was constituted. Reference is made to the general powers vested under Chapter VIII of the Act in the Government in and by which the Government is enabled to issue directions to the Registrar to make an enquiry or to take appropriate proceedings under the Act, if on audit or enquiry conducted by it, any acts of misfeasance and malfeasance are discovered. It is also stated that section 72 of the Act empowers the Registrar to dissolve the Committee of Management and appoint a person or a Committee of his choice instead. After referring to the above and the preamble of the Act, the complaint is against the introduction of Chapter IX-B of the Act by the Tamil Nadu Co-op rative Societies (Third Amendment) Act, 1970. The grievance is that by G.O. Ms. No. 57, Co-operation, dated 23rd February, 1973, the provisions of Chapter IX-B

were made applicable to Central Co-operative Banks with effect from the date of the notification. Particular reference is made to section 73-J of the Act and rule 85-NA of the Rules which were introduced by reason of the induction of Chapter IX-B, and the challenge is directly against the said two provisions on the ground that they are illegal and invalid and violate the rights guaranteed under Article 19 (1) (*c*) of the Constitution.

2. So far as section 73-J (which is the new section) is concerned, it is alleged that the appointment of the Managing Director by the Government, without there being any option to the members of the Board of Directors to elect him, violates the provisions of Article 19 (1) (*c*) of the Constitution. It is also stated that the composition of the Board of Directors of the Central Co-operative Society is changed by such compulsary induction of the Managing Director. The gravamen of the charge is that the members of the Society are compelled to act with the Managing Director and that the aforesaid alteration in the composition and the apprehension that the Managing Director would way the Board, leads to the conclusion that it has an impact on the normal fundamental right of the shareholders to form an association under Article 19 (1) (*c*) of the Constitution.

3. So far as rule 85-NA is concerned, it is stated that the powers conferred on the Executive in the garb of the rule-making powers conferred under section 73-M of the Act cannot empower the passing of such a rule and that, as in effect it would deprive the other elected members of the Board of their right to administer the affairs of the Society, it would constitute a violation of the fundamental right vested in the petitioner.

3-A. On all these grounds a writ of declaration is asked for declaring section 73-J as inoperative and rule 85-NA, read along with the above section, as offending the constitutional guarantee given to the petitioner under Articlte 19 (1) (*c*) of the Constitution.

4. In the counter-affidavit of the respondents the allegations are denied and the legal contentions are met by saying that neither section 73-J nor rule 85 NA, which are challenged, would in any way offend the fundamental right enshrined in Article 19 (1) (*c*) of the Constitution. Particular reference is made to the text of the provisions challenged and it is averred that, as the Government have an obligation to safeguard the interests of the investing public and also the financing Bank, certain safeguards were thought of, and that, if, in order to achieve this object, an amendment to the Act was brought on the anvil and a Manging Director was sought to be appointed by the Government to the Board, that would not, in the absence of any allegation that the appointment would *per se* interfere with the normal duties of the Board, violate any constitutional provision. The further contention is that it is incorrect to say that by appointing a Managing Director, the Government takes over the management of the Central Bank as alleged, and that, as the Managing Director is one among the other members of the Board, and as the views of the majority of the members would prevail, no prejudice would be caused by the induction of the two provisions. The allegation that there would be a change of composition of the Board and the members of the Board is said to be without any substance, and ultimately it is stated that the said section and the rule, which are challenged, were made in public interest, by way of remedial measures and in order to safeguard the interests of the members of the Bank and the general investing public as well and that, in these circumstances, a writ, as prayed for. ought not to issue.

5. The writ petition originally came up before my learned brother, Ramanujam, J., at a time when the Emergency provisions were in vogue and so the matter was directed to be posted before a Fuller Bench, as challenge of a particular provision of an enactment was involved. After the amendment of the Constitution, the writ petition comes up before us for final hearing.

6. Section 73-J, which has been introduced by section 2 of the Tamil Nadu Co-operative Societies (Third Amendment) Act, 1970, (Tamil Nadu Act XXXII of 1970) reads as follows.

"73-J (1) The Board shall consist of—

(*i*) such number of members to be elected and nominated as may be prescribed;

(*ii*) the Managing Director, if any appointed under sub-section (2) and

(*iii*) an *ex officio* member to be specified in the rules:

Provided that the number of nominated members shall not exceed one-fifth of the total number of members of the Board;

Provided further that the existing members of the Board on the notified date shall, subejct to the provisions of section 8 continue as members of the Board constituted for the first time after the notified date, until the expiry of their existing term of office as members: Provided also that on the constitution of the Board for the first time after the notified date, the existing office bearers of the Board on the notified date shall cease to hold office as such and new office bearers shall be elected in accordance with the rules made under this Chapter. It provides for the appointment of a Managing Director as per sub-section (2) of section 73-J. Sub-section (2) provides that a Managing Director or an Executive Officer for each apex society or central society may be appointed in such manner as may be prescribed and that the Managing Director, if appointed, shall be a member of the Board, *ex officio*."

7. It is necessary at this stage to make a digression to find out the purpose for which the new chapter was introduced in the Act. In the Statement of objects and reasons for Tamil Nadu Act XXXII of 1974, it is stated that, as the apex societies play a vital role, not only in the promotion of the interests of the affiliated units but also in the formulation of the policies and programmes for the development of the trade or industry with which the apex societies are concerned, as the State Government has also recognised the role played by apex societies in implementation of the various development plans undertaken by the State, and as the Government is sanctioning loans and grants and also giving guarantee for the loans taken by them from financing agencies, as the State Government is also participating in the share capital of the apex societies in a large way, and as ultimately such activities might involve the State Government's liability to provide for the guarantee for a larger amount, it was considered desirable that the extent of such liability should be subject to the control of the State Legislature and the apex institutions availing themslves of such large assistance by way of loans, grants and State participation etc., should have a statutory recognition and status. It is further stated that in the management of these types of societies special interests and particularly persons actually engaged in the trade or occupation or industry concerned, should have their share and rightful place. To achieve these objects, as also the main objective which is reflected in the preamble to the Act, which is to facilitate the formation and working of co-operative societies for the promotion of thrift, self help and mutual aid among persons with common economic needs, so as to bring about improvement in agriculture and industry, better methods of production, etc., Chapter IX-B was introduced. If therefore the intendment of tae Legislature in inducing the new Chapter was to further the objective of the statute itself and to give an impetus to apex societies to have a blue-print of their own and plans for development, and contemporaneously give their assistance by way of guarantee or pragmatic financial help, and if section 73-J provides for the appointment of a Managing Director, who would be *ex officio* a member of the Board, there cannot be any complaint at all. Mr. Venkataraman, learned counsel for the petitioner, says that rule 85-NA which has been introduced consequent upon the induction of Chapter IX-B and section 73-J of the Act, gives a reasonable impression that the Managing Director would be the sole authority of the Board as such even in the normal day-to day administration, that he would be a substitute for the Board in the realistic sense and that therefore such a rule framed to subserve the purpose of section 73-J of the Act would offend the essential ratio of fundamental right guranteed under Article 19 (1) (*c*) of the Constitution. We are unable to agree. On a reading of rule 85-NA (which is reproduced below for ready reference). It will be clear, that no reasonable person can gain the impression that the Managing Director is likely to ride rough-shod over any member and that he would be the only and sole authority for the administration of the affairs of the Society:

Rule 85-NA: (1) There shall be a Managing Director in each central co-operative bank, who shall be appointed by the Government.

Every person appointed as the managing director shall possess such qualifications as the Government may determine.

(2) The Managing Director shall be the executive authority of the bank and shall carry into effect the resolutions of the Committee. He shall have the over-all control of the day-to-day administration of tha bank and all correspondence shall be conducted by him or by any person authorised by him in this behalf.

(3) The managing director may institute or defend any suit or other legal proceedings on behalf of the bank.

(4) The managing director shall, have power for, and on behalf of the bank, to endorse and negotiate cheques and other negotiable instruments and to endorse and transfer promissory notes, Government and other bonds and securities, to sign deposit and other receipts of the bank and to do all acts connected with the business of the bank.

(5) The managing director shall have power to draw and sign cheques on behalf of the Bank, to operate on accounts with other banks and to overdraw same :

Provided that for any transactions exceeding such limit as may be fixed by the Registrar, the managing director shall exercise the power jointly with any of the deputy managers.

(6) The managing director shall receive all loan applications made to the Bank and shall scrutinise and place them before the executive committee for sanction :

Provided that in the case of loans on the security of jewels, fixed deposits and trustee securities, the managing director may sanction and place the same before the next meeting of the executive for its ratification.

(7) The managing director shall exercise such other powers as may be vested in him by the Registrar or by the Committee.

(8) The managing director shall convene the meeting of the Executive Committee or the Committee as and when found necessary, of the general body, as and when directed by the Committee or on receipt of requisition from requisite number or upon requisition from the Registrar.

(9) The managing directer may delegate any of his powers and functions to a deputy manager subject to the approval of the Registrar".

8. Thus it will be seen that the managing director, though having an over-all control, of the day-to-day administration of the Bank, is one who shall carry into effect the resolutions of the Committee, which consists of eight members of whom six are elected members and two are nominated by the Government. One such nominated member is the managing director appointed under rule 85-NA, consequent upon the induction of section 73-J in Chapter IX-B of the Act. If therefore, the managing director is to effectively implement the resolutions of the Committee, which *ex facie*, have the voting majority, to decide on matters concerning the Society, it would be idle for the petitioner to contend that the managing director has usurped the place of the Board as such and that there is an apprehension that he would see to it that his views and directions prevail over those of the Board and its members. No specific complaint has been made and no illustrative grievance has been set out in the pleadings, and the bare apprehension, that the managing director is likely to behave like an arbiter for himself without reference to the Board, stands merely as a bare apprehension without further proof thereof. There is intrinsic evidence in the text of rule 85-NA to show that the managing director should act in accordance with the wishes or the resolutions of the Committee. So far as loan applications are concerned which obviously form the major part of the trading activity of the Society, he could only scrutinise, but he is obliged to place them before the executive committee for sanction. This is a sure *indicia* that the appointment of the managing director is only a step-in-aid to assist the Board in the normal and proper discharge of its functions and to safeguard the interests of the State Government, who, by necessity, have got themselves involved in the activities of the Society in public interest. We have already referred to the statement of objects and reasons, which says that it was considered desirable that the extent of the liability of the State should be subject to the control of the State Legislature and that the apex institutions should have a statutory recognition and status. In order to achieve this and to provide themselves with a shield of supervision over the Board and to ensure that everything is all right in the matter of the treatment of the subjects which come up for discussion before the Board and such resolutions are in accordance with law, a managing director of the choice of the State Government which is intricately involved in the administration of such societies, was thought of. We have already referred to the preamble, to which learned counsel also made reference. Here again such co-operative societies are formed for the promotion of thrift, self-help and mutual aid among persons of common economic needs and for the development of the community at large. Public interest thus

being well served by such a co-operative movement the appointment of a managing director to assist the Board and to see that the affairs of the Board are properly performed, in accordance with law and to subserve the community at large, cannot be said to be an activity which has an impact on Article 19 (1) (c) of the Constitution at all.

9. Article 19 (1) (c) of the Constitution no doubt guarantees to every citizen the freedom to form associations or unions. No complaint is made that either section 73-J or rule 85-NA prevented the forming of such an association contemplated in Article 19 (1) (c) of the Constitution. The fundamental rights guaranteed under Article 19 (1) (c) of the Constitution have to be viewed with reference to the facts of the particular case to find out whether the challenge against any particular order of the State does make an impact or impinge upon the exercise of such a fundamental right or the acquisition of such right.

10. Reference was made to a decision of the Mysore High Court in *Kanbasappa v. State of Mysore*[1]. That was a case where two notifications were made by the State Government under which they modified the provisions of the Mysore Co-operative Societies Act and nominated 15 officials as their representatives of the Board of Directors of the Co-operative Central Bank which consisted of elected members. All these officials were to exercise their power and discharge their functions subject to the supervision, direction and control of the State Government. The effect of the notifications, as summarised by the Division Bench of the Mysore High Court was that there was absolutely no chance for any member of the Bank to get elected, as the nominated members of the Board were in the majority. That is not the case here. It was in those circumstances the the learned Judges held that the true character of the notifications was that the overnment, in the guise of exercising control over the conduct of the business of the Bank, had taken over the management of the Bank in clear disobedience of the legislative mandates expressed in the Act and therefore infringed on the vested rights of the shareholders. The facts of the present case are entirely different. Whereas there was an effacement of the Board in the Mysore case, there is a continuance of the Board in the instant case, with the only addition that a managing director was brought into the Board as *ex officio* member to give all possible aid to the Board and to subserve its resolutions, and assist them in the management and proper conduct of the society.

11. Another decision relied on by learned counsel for the petitioner has also no relevance. In *Damayanti v. Union of India*[1], the Court was dealing with the Hindi Sahitya Sammelan Act, 1962, and was formulating a proposition that the right to form an association necessarily implied that the persons forming the association had also the right to continue to be associated and also the right to be associated with only those whom they voluntarily admitted in the association. In that case, members who did not voluntarily seek for admission in the association were sought to be introduced into the association. The Supreme Court therefore observed:

> "Any law by which members are introduced in the voluntary association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined, it, will be a law violating the right to form an association.

The facts of the present case are far different from those in the case before the Supreme Court. It is not even suggested that any such attempt is being made by the State to prevent persons from becoming members of this society or to bring in members into the Society much against the wish of the existing members on the rolls of the Society. Any such law which mandates the acceptance of members who did not seek for voluntary admission to the Society, but who are compelled to become such members by reason of the provision in the statute would certainly be one which takes away or offends the right to form an association of persons within the meaning of Article 19 (1) (c) of the Constitution but not the induction of the managing director as *ex officio* member of the Board, who has nothing to do with the general body of members and who is so brought in only for the purpose of being of service to the Board and contemporaneously of service to themselves. The State itself is very much involved in such apex societies and it cannot be said that there is any effacement of the Board or its members or a total avoidance of the rights of the elected members of the Board. We have already referred in detail to rule 85-NA, wherein it has been made clear

1. (1973) 2 Mys. L.J. 43.

1. (1971) 3 S.C.R. 840: A.I.R. 1971 S.C. 966.

that the managing director is not expected to interfere with the powers of the Board which still retains the power to pass resolutions on the basis of the majority view.

12. The complaint against both section 73-J and rule 85-NA therefore fails and we hold that both the provisions have been validly enacted and do not violate Article 19 (1) (c) of the Constitution. The writ petition accordingly fails and is dismissed with costs. Counsel's fee Rs. 250.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam and R. Sengottuvelan, JJ.*

M. Kali Mudaliar, Prop. M. K. M. Bus Service, 25, Mandapam Street, Maduranthakam .. *Petitioner**

v.

The State of Tamil Nadu, represented by its Secretary, Home Department, Fort St. George, Madras-9 and others .. *Respondents.*

Motor Vehicles Act (*IV of* 1939), *section* 68-*HH—Constitution of India* (1950), *Articles* 14, 226, 303—*Nationalisation of bus route, Madras to Pondicherry — Scheme of nationalisation — Validity challenged — State Legislature, whether can amend the Motor Vehicles Act directly—Nationalisation, whether violates Article* 14 — *State Legislature competent to adopt Central Act and make suitable amendments — Nationalisation in the instant case violative of Article* 14 *but not violative of Article* 303.

The petitioner was a transport operator operating a vehicle between Madras and Pondicherry. A draft scheme of nationalisation was published in relation to this route on 6th January, 1971. Objections were called for and 28th April, 1975 was fixed as the date for hearing objections. The petitioner had challenged the scheme on the grounds that the State Legislature could not directly amend the Motor Vehicles Act and introduce section 68-HH and that the nationalisation of the route in question which was an inter-State route was violative of Article 14 and also of Article 301 read with Article 303 of the Constitution.

Held: On the basis of the principle laid down by the Full Bench in Second Appeal No. 1645 of 1974, the State Legislature could adopt the Central Act as its own and make suitable amendments thereto in exercise of its legislative power. [*Para.* 5.]

Having regard to the object which was one of nationalisation of the route there was no reason as to why the local operators alone should be excluded and the operators having primary permits from other States should be allowed to run on the route as usual. Such a differentiation did not appear to be justified by the scheme of nationalisation. In this view of the matter the proposed scheme would be violative of Article 14 of the Constitution. [*Para.* 8.]

The Legislature of a State while enacting a law under motor transport was not making a law on trade and commerce, or inter-State trade and commerce so as to attract the limitation contained in Article 303. Article 303 could not be taken to be a fetter on the legislative power of the Parliament or the State Legislature in making a law under any legislative topic other than the one relating to trade and commerce. The draft scheme in this case was not violative of Article 303 of the Constitution. [*Para.* 10.]

Cases referred to:—

Zaverbhai v. *State of Bombay*, 1954 S.C.J. 851: (1955) 1 S.C.R. 799: A. I. R. 1954 S.C. 752; *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, (1896) A.C. 348; *Jaora Sugar Mills* v. *State*, (1967) 1 S.C.J. 92: (1966) 1 S.C.R. 493: (1967) M.L.J. (Crl.) 10: A.I.R. 1966 S.C. 523; *Krishna Chandra* v. *Union of India*, (1975) 2 S.C.C. 302: A.I.R. 1975 S. C. 1389; *Zoolfiquar Ali* v. *Official Trustee*, (1967) 69 Bom.L.R. 326; *Sindhi Sahiti Multipurpose Transport Co-operative Society Ltd.* v. *State of Madhya Pradesh*, (1977) 1 S.C.W.R. 145: (1977) 1 S.C.C. 403: (1977) 2 S.C.R. 86: A.I.R. 1977 S.C. 441; *Prag Ice and Oil Mills* v. *Union of India*, 1978 Crl.L.J. 1281: (1978) 3 S. C. C. 459: (1978) 3 S.C.R. 293: A. I. R. 1978 S.C. 1296; *Kalyan Singh* v. *State of U.P.*, (1963) 1 S.C.J. 50: A. I. R. 1962 S. C. 1183;

*W.P. No. 2873 of 1975. *6th March*, 1979.

Natesa Reddiar v. *Saradambal*, (1979) 2 M.L.J. 33: 92 L. W. 275: A.I.R. 1979 Mad. 223; *B. S. Padmavathamma* v. *Andhra Pradesh State Road Transport Corporation*, (1978) 1 A.P.L.J. 492: (1978) 2 An.W.R. 559.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition, prohibiting the respondent herein from taking any proceedings pursuant to the draft scheme published in the Tamil Nadu Government Gazette, Extraordinary, Part-III, dated 6th January, 1971 in respect of the petitioner's route Madras to Pondicherry.

G. Ramaswamy for *M. Krishnappan*, for Petitioner.

R. Krishnamoorthy, Government Pleader and *N. G. Krishna Ayyar*, for Respondents.

The Order of the Court was made by

Ramanujam, J.—The petitioner herein is a transport operator operating a vehicle from Madras to Pondicherry. A draft scheme of nationalisation was published in relation to this route on 6th January, 1971. Objections were called for and 28th April, 1975 was fixed as the date for hearing the objections. The petitioner has filed this writ petition on 21st April, 1975 seeking a writ of prohibition prohibiting the respondents from taking any further proceedings in pursuance of the said draft scheme, dated 6th January, 1971. The following contentions have been urged by the petitioner in this writ petition:—

(1) Section 68-HH which has been introduced in the Motor Vehicles Act by Tamil Nadu Amendment Act XVIII of 1968 is invalid for the reason that the State Legislature cannot directly amend the Motor Vehicles Act enacted by the Parliament notwithstanding Article 254 (2) of the Constitution. (2) That the nationalisation of the route in question which is an inter-State route is violative of not only Article 14 but also of Article 301 read with Article 303 of the Constitution. (3) That there is inconsistency between the entries found in Schedules I and II in that the petitioner's name is shown in Annexure I though the scheme is said to be to the total exclusion of all private operators. (4) That section 68-HH, in so far as enables the State Government to delegate the power to more than one authority, is bad.

2. The contentions Nos. 3 and 4 set out above have already been dealt with in W.P. No. 2963 of 1974 and they have been rejected exactly under similar circumstances. Hence, these contentions have to be rejected following the view taken in that case. Only the first two contentions remain to be considered.

3. As regards the first contention the petitioner's submission is as follows:—Section 68-HH has been added to the Motor Vehicles Act authorising the State Government to delegate by notification the powers exercisable under Chapter IV-A by the State Transport Undertaking, being the State itself, to such authority or Gazetted Officer subordinate to the State Government as may be specified, in the notification. In pursuance of the powers conferred on the State Government by section 68-HH the State Government has by its order G.O. Ms. No. 1199, Home, dated 20th May, 1969 delegated the power to the Director of State Transport Department. This delegation will include the various powers under Chapter IV-A of the Act including the power under section 68-C to form the opinion mentioned therein and promulgate a draft scheme. It is in pursuance of this delegation the Director, State Transport Department, Madras has promulgated the draft scheme on 6th January, 1961 which is impugned herein. If section 68-HH was not there, the opinion would have been formed by the State Government in accordance with the rules of business made under Article 166 of the Constitution and the Director of Tamil Nadu, State Transport Department would have no *locus standi* to frame a draft scheme under section 68-C of the Act. Section 68-HH has been introduced by the Tamil Nadu Act XVIII of 1968. But the Tamil Nadu Legislature has no power directly to repeal or amend a Central Act notwithstanding the provision in Article 254 (2) of the Constitution. The said Article does not authorise the Legislature of a State either to repeal or amend a Central Act and in so far as the Tamil Nadu Act XVIII of 1968 has amend-

ed the Central law by introducing section 68-HH, it has to be taken to be void.

4. Learned counsel for the petitioner in support of his submission relied on a decision of a Division Bench of this Court in Writ Appeal No. 526 of 1975 batch dated 15th April, 1975 (V. G. Ramakrishnan, Sri Ramakrishna Bus Service, Wallajabad appellant etc.). In that case by section 5 of Tamil Nadu Act XLVIII of 1974, section 133 (1) of the Motor Vehicles Act was repealed. The said Madras amending Act received the Presidential assent on 4th November, 1974 and the amending Act came into force from 8th November, 1974. It was contended before the Bench that it is beyond the power of the State Legislature to enact section 5 which repealed section 133 (1) of the Motor Vehicles Act. Dealing with this contention the Bench observed that though the topic of legislation, motor transport, is a concurrent subject covered by Entry 35 of List III of the VII Schedule to the Constitution, there being no power given by the Constitution to the State Legislature to directly repeal a Central enactment under that entry, the State Legislature cannot amend or repeal any Central Act, notwithstanding the existence of Article 254 (2) of the Constitution. According to the Bench,

"That was settled by the Supreme Court long before, for instance, that proposition was held by *Zaverbhai* v. *State of Bombay*[1]. Under section 107 (2) of the Government of India Act, 1935, which is similar to Article 254 (2) of the Constitution of India, the Central Legislature had no authority conferred upon it to enact a statute repealing directly any provincial statute. This proposition was justified by a decision on a like provision in the Canadian Constitution in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*[2], where it was held that though a law enacted by the Parliament of Canada and within its competence would override Provincial legislation covering the same field, the Dominion Parliament had no authority conferred upon it under the Constitution to enact a statute repealing directly any Provincial statute".

The observations of the Supreme Court in *Zaverbhai's case*[1], relied on by the Bench are these:—

"Discussing the nature of the power of the Dominion Legislature, Canada, in relation to that of the Provincial Legislature, in a situation similar to that under section 107 (2) of the Government of India Act, it was observed by Lord Weston in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*[2], that though a law enacted by the Parliament of Canada and within its competence would override Provincial legislation covering the same field, the Dominion Parliament had no authority conferred upon it under the Constitution to enact a statute repealing directly any Provincial statute. That would appear to have been the position under section 107 (2) of the Government of India Act with reference to the subjects mentioned in the Concurrent List".

It is on the basis of the above observations section 5 of Tamil Nadu Act XLVIII of 1974, was struck down as being unconstitutional by the Division Bench. The contention of the learned counsel for the petitioner is that in view of the said decision of the Division Bench section 68-HH of the Act which has been introduced by the Tamil Nadu Act XVIII of 1968 has to be struck down as unconstitutional for want of legislative competence.

5. The learned counsel for the respondents on the other hand submits that the decision of the Bench in the above case should be taken to have been impliedly overruled by the Full Bench decision of this Court in *Natesa Reddiar and another* v. *Saradambal and two others*[3]. In the said second appeal the question that arose for consideration before the Full Bench was as regards the constitutional validity of the Tamil Nadu Hindu Women's Rights to Property (Extension to Agricultural Lands) Act. The said Act merely amended the Hindu

1. 1954 S.C.J. 851 : (1955) 1 S.C.R. 799 : A.I.R. 1954 S.C. 752.
2. (1896) A.C. 348.

1. 1954 S.C.J. 851 : (1955) 1 S.C.R. 799 : A.I.R. 1954 S.C. 752.
2. (1896) A.C. 348.
3. (1979) 2 M.L.J. 33 ; 92 L.W. 275 ; A.I.R. 1979 Mad. 223.

Women's Rights to Property Act XVIII of 1937, which is a Central Act, so far as it is applicable to Madras State. A similar contention as the one in this case was urged in that case as well. It was urged in that case that it is not open to the State Legislature to amend the definition of property occurring in the Central Act as it has no power to do so. This contention was also based on the observation of the Supreme Court above extracted in *Zaverbhai's case*[1]. Dealing with the said observations of the Supreme Court with reference to the contention put forward by the petitioner, the Full Bench observed that these observations cannot be taken to be even *obiter dicta* being casual observations and the above observations cannot be taken advantage of by the appellants to question the validity of the Tamil Nadu Act XXVI of 1947, on the ground that the provincial Legislature cannot directly amend the Central Act, and that the said observations have to be taken only as casual observations and not as a decision in that case and that such an observation on a question which the Supreme Court was not required to decide cannot be treated as having been decided so as to become a binding decision. It was held ultimately in that case that so long as the State Legislature could adopt and incorporate an Act passed by the Central Legislature by making suitable amendments thereto, it can adopt the Central Act and amend the same provided the requisite assent has been obtained from the President under section 254 (2) of the Constitution. The Full Bench has also pointed out that the State Legislature could adopt and incorporate an Act passed by the Central Legislature by making suitable amendments thereto, is concluded by the two decisions of Supreme Court *i.e., Jaora Sugar Mills* v. *State*[2] and *Krishna Chandra* v. *Union of India*[3]. Though the Full Bench has not referred to the decision of the earlier Division Bench in Writ Appeal No. 526 of 1975, batch, the observations of the Supreme Court in *Zaverbhai's case*[1], which formed the basis for the decision of the Division Bench were understood as casual observations and not as a binding decision. The Full Bench has taken the view that the said later two decisions of the Supreme Court indicate that the observations in *Zaverbhai's case*[1], cannot be correct. The Full Bench also referred to the decision of the Bombay High Court in *Zoolfiquar Ali* v. *Official Trustee*[2], which took a view different from the said observations made in *Zaverbhai's case*[1]. We are, therefore, inclined to agree with the learned counsel for the respondents that in view of the Full Bench decision which has taken a contrary view, the decision of the Bench in Writ Appeal No. 526 of 1975 should be taken to have been impliedly overruled. We are of the view that on the basis of the principle laid down in the Full Bench in Second Appeal No. 1645 of 1974, the State Legislature can adopt the Central Act as its own and make suitable amendments thereto in exercise of its legislative power. In this case, admittedly the State Legislature has got the power to legislate on the topic of motor transport under Entry 35 of List III. Instead of making a separate law it adopted the Motor Vehicles Act, which is a Law enacted by the Parliament, as its own and introduced section 68-HH therein. It is always open to any Legislature if, it so chooses to adopt any existing piece of legislation made by any other legislative body as its own and apply the same with such modifications as considered necessary to suit its object and purpose and by such adoption and incorporation the Act which has been incorporated becomes an Act passed by it. It must be remembered that the case before the Full Bench related to the amendment made by the State Legislature in exercise of its power under legislative Entry in List II to a Central law made in respect of a legislative Entry in List I. Even in such a case, the Full Bench felt that the State Legislature could adopt and incorporate a legislation made by the Parliament and amend the same as if it were an Act passed by it within its legislative sphere. Here we have an *a fortiori* case where both Parliament and the State Legislature have concurrent power to enact on the topic of motor transport. It is true the

1. 1954 S.C.J. 851 : (1955) 1 S.C.R. 799 : A.I.R. 1954 S.C. 752.
2. (1966) 1 S.C.R. 493 : (1967) 1 S.C.J. 92 : (1967) M.L.J. (Crl.) 107: A.I.R. 1966 S.C. 523.
3. (1975) 2 S.C.C. 302 : A.I.R. 1975 S.C. 1389.

1. 1954 S.C.J. 851 : (1955) 1 S.C.R. 799 : A.I.R. 1954 S.C. 752.
2. (1967) 69 Bom.L.R. 326.

Parliament has made a comprehensive law on the topic of motor transport, by enacting the Motor Vehicles Act. But Article 254 (2), specifically enables the State Legislature to enact a law on the same topic in exercise of its legislative power with the assent of the President. There is, therefore, no question of section 68-HH being invalid for the reason that the State Legislature has no legislative competence to do so. In view of the foregoing discussion, the first contention has to be rejected.

6. The second contention is two fold. One is that the nationalisation of inter-State route in this case offends Article 14 as being discriminatory. As regards the complaint based on Article 14, the argument is as follows:

In the draft scheme relating to the route in Schedule I item 3 it is stated that the scheme is for the complete exclusion of the operators other than those holding primary permits issued by the transport authority of Pondicherry. According to the petitioner there are five operators including himself for whom permits have been issued for the route in question by the transport authority in Madras State, and three operators who had been granted permits by the Pondicherry State Transport Authority. In a scheme of nationalisation of road transport for an area or a route there is no justification for permitting the operators holding primary permits issued by the Regional Transport Authority of Pondicherry State to operate while eliminating the operators who got primary permits from the authorities in Madras State. Permitting the primary permit holders of Pondicherry alone to continue to ply on the route will amount to a hostile and conscious discrimination which is hit under Article 14 of the Constitution. It is also stated that such discrimination between persons having primary permits from local authorities and those getting primary permits from authorities outside the State has no reasonable nexus with the object of the scheme of nationalisation.

As regards this contention learned counsel for the respondents submits that Chapter IV-A under which the scheme of nationalisation has been notified is included in the 9th Schedule and therefore no challenge can be made against a scheme framed under Chapter IV-A under Articles 14 and 19 of the Constitution. The inclusion of Chapter IV-A in the 9th Schedule will certainly give immunity for the said Chapter from a challenge under Articles 14 and 19 of the Constitution. But the said immunity cannot extend to all the schemes or other proceedings taken under the said Chapter. Immunity cannot extend to the executive action taken under Chapter IV-A. This has been so held in *Sindhi Sahiti Multipurpose Transport, Co-operative Society Limited* v. *State of Madhya Pradesh and others*[1]. In that case the Supreme Court has held that though Chapter IV-A of the Act is not open to any constitutional challenge in view of its inclusion in 9th Schedule, it is open to any aggrieved person to challenge any scheme framed thereunder on the ground that it is not a valid scheme as required by the provisions of Chapter IV-A. *Prag Ice and Oil Mills* v. *Union of India*[2], is a case which arose under the Essential Commodities Act. In that case the Supreme Court expressed the view that though the Essential Commodities Act, having been placed in the 9th Schedule of the Constitution, is not open to constitutional attack, that protection does not extend to anything done or to be done in future under any of the provisions of the said Act or any orders made under section 3 of that Act. In view of these decisions the schemes framed under Chapter IV-A can be challenged on the basis of a discrimination violative of Article 14.

7. On the merits of the petitioner's contention that the notification is discriminatory and as such it is violative of Article 14 in that out of the seven existing operators on the route only five are eliminated and the rest are being allowed to operate on the route which has been nationalised, learned counsel for the respondents contends that unless the persons having primary permits from Pondicherry State are allowed to continue to ope-

1. (1977) 1 S.C.W.R. 145 : (1977) 1 S.C.C. 403 : (1977) 2 S.C.R. 86 : A.I.R. 1977 S.C. 441.

2. 1978 Cri. L.J. 1281 : (1978) 3 S.C.C. 459 : (1978) 3 S.C.R. 293 : A.I.R. 1978 S.C. 1296.

rate, the Government of Pondicherry may refuse to countersign the permits issued to the vehicles introduced on the route as a result of the nationalisation, that only with a view to avoid such a situation the operators having primary permits from Pondicherry State have not been excluded from operating on the route. The reasoning given by the respondents for not excluding the operators having primary permits from Pondicherry State has no nexus with the object of the scheme which is one of nationalisation of the route in question. The fact that some other authority in Pondicherry may not give its countersignature, if the persons having primary permits from that authority are not allowed to continue on the route is quite irrelevant. It has no rational relation with the object of nationalisation.

8. It is also submitted by the learned counsel for the respondents that the operators having primary permits from the Madras State and operators having primary permits from Pondicherry State are persons differently situated and therefore a differentiation may be made between the two. But, having regard to the object which is one of nationalisation of the route there is no reason as to why the local operators alone should be excluded and the operators having primary permits from other State should be allowed to run on the route as usual. Such a differentiation does not appear to be justified by the scheme of nationalisation. In this view of the matter we are inclined to hold that the proposed scheme is violative of Article 14 of the Constitution.

9. A similar view has been taken by the Division Bench of Andhra Pradesh High Court in *B. S. Padmavathamma* v. *Andhra Pradesh State Road Transport Corporation by its General Manager, Hyderabad and* 3 *others*[1], wherein the Court has upheld the attack based on Article 14 for the reason that the draft scheme expressly provided for saving some of the operators while eliminating others thereby bringing about a discrimination between the operators of that State and those in other States.

1. (1978) 1 A.P.L.J. 492 : (1978) 2 An. W.R. 559.

10. Coming to the further submission of the learned counsel that the scheme is violative of Article 303 of the Constitution, it is seen that a decision of the Andhra Pradesh High Court in *B. S. Padmavathamma* v. *Andhra Pradesh State Road Transport Corporation by its General Manager, Hyderabad and three others*[1], supports the petitioner's stand. In that case, a draft scheme proposed under section 68-C of the Act in respect of an inter-State route was challenged *inter alia* on the ground that it is violative of Article 303. The Court upheld that contention, on the ground that the proposed draft scheme does make and bring about a discrimination between the operators in one State and operators of another State and as such it is hit by Article 303 of the Constitution. The reasoning of the learned Judges in that case is this:

"Articles 301 to 303 do make, in our opinion, one thing clear. While the Parliament can impose restrictions on the freedom of trade, commerce and intercourse, between one State and another or within any part of the territory of India, in public interest, it shall not, in that process, provide for preference to the subjects of one State over another, or discriminate the subjects of one State against another. The constitution makers, obviously wanted to ensure the economic integrity of the country by prohibiting such preference and discrimination, with a view to promote the true integration and unity of the people of India. Now, it is axiomatic that what the law cannot do, the authority acting under the law cannot equally do. It may also be noticed that Article 303 does not even provide for any classification on the basis of territory, or otherwise, as is held by Courts to be authorised by Article 114. If we contract the language emphasised in clause (*b*) of Article 304 this aspect becomes clearer. We are, therefore, of the opinion that Mr. Venugopal is right when he complains that the proposed schemes do make and bring about a discrimination between the operators of this State and the operators of the

1. (1978) 1 A.P.L.J. 492 : (1978) 2 An. W.R. 559.

Karnataka State and are, therefore, hit by Article 303."

Learned counsel for the respondents faced with the above decision contends that the said decision runs counter to the decision of the Supreme Court in *Kalyan Singh v. State of U. P.*[1] and that the said decision has not given due weight to the following phrase occurring in section 303 (1):

"........... by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule."

According to the respondents unless the discrimination between one State and another is brought about by a legislation on a topic relating to trade and commerce in any of the Lists in 7th Schedule, Article 303 will not come into operation, and the draft scheme is not a law made by the legislature of a State by virtue of any entry relating to trade and commerce which contemplates preference of one State over another or a discrimination between the State and another and only in such cases Article 303 can be invoked. Learned counsel seeks support for this submission from a passage in Seervai's Constitutional law of India, Second Edition, Volume II:

"The *non obstante* clause in Article 303 (1), in so far as it refers to Parliament, limits Parliament's power to impose restrictions on the freedom of trade, commerce or intercourse in the public interest. This limitation denies to Parliament the power to make any law giving, or authorising the giving of any preference to one State over another, or making or authorising the making of, any discrimination between the State and another by virtue of any entry relating to trade and commerce in any of the Lists in Schedule VII. It is clear that the words referring to the entries, whatever may be the content of those entries, are words of limitation and they do not exclude preference or discrimination by virtue of any other entry, though as has been submitted earlier, any such preference or discrimination would have to stand the test of Article 14. It is clear however that under our Constitution an entry relating to trade or commerce cannot cover a tax since taxing entries are separated from the general subject of legislation. Therefore, the discrimination which is forbidden does not refer to a tax and the same is true of the State Legislatures since the language is identical."

Article 303 refers to a law made by Parliament or a Legislature of a State under any entry relating to trade and commerce in any of the Lists in 7th Schedule and says that a law made under that entry cannot give or authorise any preference of one State over another or make a differentiation between one State and another. It is not possible to ignore the language of Article 303 and say that any discrimination made between one State and another or people of one State and another in any legislation can be challenged under Article 303. The trade and commerce as a topic of legislative entry occurs in Entry 41 and Entry 42 of List I, Entry 26 of List 2 and Entry 33 of List 3. Here, the provisions of Shapter IV-A of the Motor Vehicles Act have been enacted under the legislative Entry 35 occurring in List 3. Therefore, the Legislature of a State while enacting a law under Motor Transport is not making a law on trade and commerce, or inter-State trade and commerce so as to attract the limitation contained in Article 303. The Article 303, in our view, cannot be taken to be a fetter on the legislative power of the Parliament or of the State Legislature in making a law under any legislative topic other than the one relating to trade and commerce. This aspect of the matter has not been considered by the Andhra Pradesh High Court in the above case, presumably the point was not urged before them. We are, therefore, of the view that the draft scheme in this case is not violative of Article 303 of the Constitution.

11. As a result of the foregoing discussion, the draft scheme has to be held to be bad for violation of Article 14. Therefore, this writ petition is allowed.

S.J. ——— *Petition allowed.*

1. (1963) 1 S.C.J. 50: A.I.R. 1962 S.C. 1183.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam and S. Ratnavel Pandian, JJ.*

V. Velluswamy .. *Petitioner**

v.

The Inspector-General of Police, Tamil Nadu, Madras-4 and another .. *Respondents.*

Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules, rule 15-A—Constitution of India (1950); *Article* 226 (3) *—Petitioner Detective Inspector in Police Department — Charges framed against and disciplinary enquiry conducted — Petitioner compulsorily retired from service — Appeal by petitioner to Inspector-General of Police —Appeal dismissed — No petition to review the order by the Government — Petitioner straightaway filing writ of* certiorari *to quash the order—Alternative remedy not exhausted — Extraordinary jurisdiction of the Court, whether can be invoked.*

The petitioner who was a Detective Inspector was suspended from service pending enquiry into certain charges. A set of three charges was framed. A disciplinary enquiry followed and ultimately the petitioner was compulsorily retired from service. The petitioner filed an appeal against the said order of punishment to the Inspector-General of Police. The said appeal having failed, the petitioner filed a writ petition with a prayer for the issue of a writ of *certiorari* to quash the order of punishment imposed by the original authority. A preliminary objection was taken regarding the maintainability of the writ petition.

Held, that as per rule 15-A of the Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules any person aggrieved against an order of the punishing authority or the appellate authority can make representations to the Government which is higher than the appellate authority for revising the orders from the appellate authority and the Government may call for the records from the appellate authority and review the orders. Admittedly the petitioner had not approached the Government with an application for review under the said rule 15-A. If rule 15-A is treated to be an alternative statutory remedy available to the petitioner, then Article 226 (3) will come in the way of the petitioner maintaining the writ petition. Article 226 (3) as amended specifically says that no writ petition shall be entertained in a case where there is an alternative remedy available to the party except in cases where enforcement of fundamental right is involved. [*Para.* 3.]

Rule 15-A specifically says that the power of the Government to review an order passed by the subordinate authority can be invoked by the party. In view of the finding that rule 15-A gives an alternative remedy to the petitioner to agitate against an order of punishment imposed by the original authority as affirmed by the appellate authority, the writ petition cannot be entertained. [*Para.* 6.]

Case referred to:—

Shiraguppi v. *Deputy Superintendent of Police,* 1978 Lab.I.C. 60: (1977) 2 Karn. L.J. 225: I.L.R. (1977) 2 Karn. 1131: (1977) 2 Serv.L.R. 836.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 1st Respondent in his C. No. 194778|API|77, dated 22nd April, 1978 confirming the order of the 2nd Respondent, dated 18th January, 1977 and quash the same.

B. Shantha Kumar, for Petitioner.

Ramajagadeesan, for Government Pleader, for Respondents.

The Order of the Court was delivered by

Ramanujam, J.—The petitioner who was a Detective Inspector till March, 1976 was suspended from service pending enquiry on certain charges. On 15th March, 1976 a set of three charges had been framed against him. A disciplinary enquiry followed and

*W.P. No. 2931 of 1978. *13th March,* 1979.

ultimately the petitioner was compulsorily retired from service by the second respondent. Thereafter the petitioner filed an appeal against the said order of punishment to the Inspector-General of Police, the first respondent herein. The said appeal having failed, the petitioner has come before this Court with a prayer for the issue of a writ of *certiorari* to quash the said order of punishment passed by the original authority as affirmed by the appellate authority.

2. The learned counsel for the petitioner has raised various grounds which according to him go to the root of the matter, and if the grounds urged by him are accepted, the order of punishment would stand vitiated. The learned counsel generally points out the various defects at the various stages of the enquiry proceedings and states that those defects virtually vitiated the enquiry proceedings. But having regard to the nature of the order which we propose to make in this case, it is not necessary to go into the merits of the said contentions put forward by the learned counsel for the petitioner.

3. The respondents have taken a preliminary objection to the maintainability of the writ petition apart from meeting the various contentions advanced by the petitioner as to the alleged defects at the stage of the enquiry. The preliminary objection is that as against the appellate order passed by the first respondent a right of review before the Government is available to the petitioner under rule 15-A of the Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules, 1955 and that in view of the said alternative remedy available to the petitioner, he cannot invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution, especially after the amended provision in Article 226 (3) of the Constitution had come into force. Rule 15-A is as follows:

> "15-A. Nothing contained in these rules shall be deemed to preclude an authority higher than the appellate authority from reviewing any case either on its own initiative or on representation from a member of the service against the order of the punishing authority or appellate authority or the order of an authority higher than the appellate authority but lower than itself and passing such orders as it thinks proper. For this purpose, it may call for the records at any stage notwithstanding that any representation already made to a subordinate authority for reviewing the case has not been gone into or disposed of:
>
> Provided, however, that no application for review shall be preferred more than once in respect of the same order:
>
> Provided further that members of the constabulary (Police Constables and Head Constables) shall be eligible to make one representation to the Government against orders of dismissal after exhausting the right of appeal."

As per the said rule any person aggrieved against an order of the punishing authority or the appellate authority can make representations to the Government which is higher than the appellate authority for reviewing the orders of the appellate authority and the Government may call for the records from the appellate authority and review the case. Admittedly the petitioner has not approached the Government with an application for review under the said rule 15-A. If rule 15-A is treated to be an alternative statutory remedy available to the petitioner, then Article 226 (3) will come in the way of the petitioner maintaining the writ petition before this Court. Article 226 (3) as amended specifically says that no writ petition shall be entertained by this Court in a case where there is an alternative remedy available to the party except in cases where enforcement of fundamental rights is involved. Taking note of this position, the learned counsel for the petitioner contends that rule 15-A cannot be taken to be an alternative remedy at all as the said rule merely enables the Government to review the orders of the subordinate authorities on its own initiative and such an enabling power on the part of the Government cannot be construed as a right given to the persons like the petitioner in respect of whom an order of punishment has been made by the subordinate authorities.

4. The learned counsel, in support of his submission, refers to the decision of the

Karnataka High Court in *Shiraguppi* v. *Deputy Superintendent of Police*[1]. In that case a somewhat similar provision in section 25 (2) of the Karnataka Police Act, 1963 came up for consideration. The said section was follows:

> "The Government may *suo motu* or otherwise, after calling for the records of the case, revise any order under section 23 or sub-section (1) of this section passed by the Inspector-General or any other officer subordinate to him, and—
>
> (*a*) confirm, modify, set aside the order;
>
> (*b*) impose any penalty or set aside, reduce, confirm or enhance the penalty imposed by the order;
>
> (*c*) remit the case to the authority which made the order or to any other authority directing such further action or enquiry as it considers proper in the circumstances of the case; or
>
> (*d*) pass such other orders as it deems fit".

Construing that provision the Karnataka High Court held that the said section 25 (2) is not a bar to the maintainability of the writ petition as the requirements of Article 226 (3) of the Constitution are not adequately and effectively met by the revisionary powers provided in that section. With due respect, we are not inclined to accept the view taken in that case. The section 25 (2) specifically enabled the Government to revise any order of punishment passed under section 23 of the Karnataka Police Act either *suo motu* or otherwise, and the Government was given the power to confirm, modify or set aside the order of punishment imposed or impose any penalty or set aside the order of punishment imposed or impose any penalty or set aside, reduce, confirm or enhance the penalty imposed by the lower authorities or remit the case to the lower authorities for further consideration. When such a specific power has been given to the Government to give suitable relief to the persons aggrieved against the order of punishment imposed by the Inspector-General of Police or any other officer subordinate to him we do not see why that power of the Government cannot be invoked by the party. Whatever relief the Court under Article 226 can give, the Government can also give under section 25 (2) of the said Act. In the face of the wide language used in section 25 (2) of the Karnataka Police Act, we are of the view that no other conclusion is possible except to say that the remedy under section 25 (2) is an alternative and adequate remedy available to the aggrieved party. We are not, therefore, inclined to accept the principle laid down in that decision as correct.

5. On the other hand we have got the decision of a Full Bench of this Court in *Munuswami Reddiar* v. *Commissioner, Hindu Religious and Charitable Endowments*[1], wherein section 115 (1) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, was considered. The Full Bench in that case held that though section 114 (1) does not say specifically that a party can invoke the revisional power of the Government, still the Government has to exercise the power under that section if a party moves the Government by filing an application for revising the order of the Commissioner, Hindu Religious and Charitable Endowments. The Full Bench has observed that section 114 (1) used practically the same language as section 115 of the Code of Civil Procedure and that revision petitions are normally entertained by the High Court under section 115, Civil Procedure Code, even though it does not specifically say that the revisional power of the High Court could be invoked by the party. The following observations of the Full Bench appear to be pertinent:

> "Section 114 gives very wide powers to the Government to deal with any orders passed by the Commissioner, Deputy Commissioner or Assistant Commissioner at any time. Normally, when such a power is granted to the Government, it would be possible for a party aggrieved by the orders of the authorities mentioned in section 114 (1) to invoke the exercise of such power by an application before that authority. This is so even if there is no specific provision in the section stating specifically that a party may apply to the

1. 1978 Lab. I.C. 60 : (1977) 2 Kar. L.J. 225.

Government. A glance at section 115, Civil Procedure Code, shows that the section as such does not contemplate any application. Exercise of power under section 115, Civil Procedure Code, by the High Court has been mainly on applications made by the parties. We see no justification whatever in understanding section 114 (1) which is worded in very similar terms to section 115, Civil Procedure Code, in a different way. So sub-section (1) of section 114 of the Act has to be understood as conferring a power in the Government either *suo motu* to call for the records and examine the propriety, legality etc., of the orders or proceedings, or by application by the aggrieved party".

6. Rule 15-A with which we are concerned in this case specifically says that the power of the Government to review an order passed by the subordinate authority can be invoked by the party. Therefore, even the controversy that arose before the Full Bench cannot arise here. We are not prepared to agree with the contention of the learned counsel for the petitioner that the remedy available to the party under rule 15-A cannot be taken to be an alternative remedy which will bar the presentation of the writ petition before this Court. In view of our finding that rule 15-A gives an alternative remedy to the petitioner to agitate against the order of punishment imposed by the original authority as affirmed by the appellate authority, we cannot entertain this writ petition in view of the specific provision contained in Article 226 (3) as amended.

7. Therefore, without expressing any opinion on the merits of the petitioner's contentions, this writ petition is dismissed, with liberty to approach the Goverment under rule 15-A. The petitioner is given a months time from today for filing an application for review under the said rule. Having regard to the fact that the appeal before the first respondent has been kept pending for more than a year, we direct the Government to dispose of the review application, if any, filed by the petitioner under rule 15-A, as expeditiously as possible. There will, however, be no order as to costs.

R.S. — *Writ petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and V. Sethuraman, JJ.*

A. N. N. K. Mohamed Kasim and others .. *Appellants**

v.

Alagan and others .. *Respondents.*

Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963), sections 9, 10, 11 and 12—Inam—Application by landholder for issue of ryotwari patta on the basis of the inam being a new inam estate—Finding by Assistant Settlement Officer of lands being private lands—Patta not granted however for lack of proof of cultivation and possession by landholder under section 9—Respondent held entitled to patta under section 11—Appeal to the Tribunal—Tribunal holding the lands to be ryoti lands and granting patta to respondent under section 10 of the Act—Tribunal's order whether correct

The appellants herein claimed ryotwari patta under section 9 of the Tamil Nadu Act XXVI of 1963 on the basis that the inam in question was a new inam estate. The Assistant Settlement Officer III (Enquiries), Karaikudi, by his order dated 29th May, 1970, held that the lands involved were private lands. Still he did not grant ryotwari patta to the appellants on the ground that they had not proved cultivation and possession for the requisite period as provided for under section 9 of the Act with regard to the new inam estate. On the other hand he held that the respondents would be entitled to ryotwari patta under section 11 of the Act, as the appellants were not entitled to get patta under section 9 of the Act. Against this order of the Assistant Settlement Officer, the appellants preferred an appeal before the Tribunal. The respondents contended before the Tribunal that the lands were ryoti lands and that they were entitled to ryotwari patta on that basis under section 10 of the Act. The Tribunal accepted this case of the respondents and reversed the finding of the Assistant Settlement Officer that the lands were private lands and held that the lands were ryoti lands and directed grant of patta under section 10 of the Act. It is against this order that the present appeal was filed by the landholders.

*S.T.A. No. 127 of 1975. 14th September, 1978.

Held: A perusal of the order of the Assistant Settlement Officer makes it clear that the respondents herein put forward a case that the lands were ryoti lands, but the Assistant Settlement Officer did not accept that case and, however, he granted patta only under section 11 of the Act. It must be noted that section 11 comes into operation only when no one is entitled to ryotwari patta in respect of a private land under section 9 and none is entitled to ryotwari patta in respect of a ryoti land under section 10. Consequently section 11 is more or less in the nature of a residuary section. Hence once the Assistant Settlement Officer found that the lands were private lands and the appellants were not entitled to ryotwari patta, because they had not proved possession and cultivation for the requisite period, the grant was naturally made by the Assistant Settlement Officer in favour of the respondents under section 11 (1) on the basis that the lands were only private lands. Consequently in an appeal preferred by the appellants herein, the respondents herein were entitled to put forward the contention that the Assistant Settlement Officer was wrong in holding that the lands were private lands and that he ought to have held that they were ryoti lands and that the respondents were entitled to ryotwari patta under section 10 (1) of the Act. In view of this, the Tribunal had jurisdiction to reverse the finding of the Assistant Settlement Officer with regard to the character of the lands. [*Para*. 2.]

Section 12 of the Act deals with the determination of the question by the Settlement Officer and appeal against the said decision or determination. Sub-section (1) of section 12 states that the Settlement Officer shall examine the claims of any person for a ryotwari patta under section 9 or section 10 or section 11, as the case may be, and decide in respect of which lands the claim should be allowed. [*Para*. 3.].

Consequently, the person who can appeal to the Tribunal is one who is "aggrieved" by the decision of the Settlement Officer under section 12 (1). The decision of the Settlement Officer under section 12 (1) is as to in respect of which lands the claim for patta should be allowed. Therefore even though the respondents herein claimed ryotwari patta under section 10, once they were granted ryotwari patta under section 11, they could not be said to have been "aggrieved" by the decision of the Assistant Settlement Officer and therefore they could not have preferred an appeal against the order of the Assistant Settlement Officer, simply because the Assistant Settlement Officer had held that the lands were private lands and not ryoti lands. Hence, the contention of the learned counsel for the appellant that the Tribunal had no jurisdiction to hold that the lands were ryoti lands in an appeal preferred by the appellants herein against the order of the Assistant Settlement Officer who had held that the lands were private lands has to be rejeated [*Para*. 3.]

The Assistant Settlement Officer as well as the Tribunal were under an obligation to go into each item of the lands and to find out as to whether it is private land or ryoti land for the purpose of deciding the claim to ryotwari patta put forward by the parties. As pointed out already, the Assistant Settlement Officer held that all the lands were private lands, while the Tribunal held that all the lands were ryoti lands. This is an over-simplification of the controversy between the parties. It is true that before the Assistant Settlement Officer the appellants put forward the claim that all the lands were private lands. From that it does not follow that if it is established that some of the lands were ryoti lands, the entire claim of the appellants must be thrown out. It is for the authorities below to examine which land was private land and which land was ryoti land and further examine with reference to such land, who was entitled to patta and under which provision. [*Para*. 4.]

Special Tribunal Appeal under section 46 of Tamil Nadu Act. (XXVI of 1963) against the Judgment and order dated 30th May, 1974 of the Special Tribunal, Inam Abolition, Ramanathapuram at Sivaganga and made in Revenue Appeal No. 172 of 1971 (S.R. 273/TPR/69/A.S.O. III dated 29th May, 1970, Assistant Settlement Officer III (Enquiries, Karaikudi).

T. Rangaswami Iyengar, for Appellant.

The Judgment of the Court was delivered by

Ismail, J.—This is an appeal against the order of the Special Tribunal, Inam Abolition, Ramanathapuram at Sivaganga dated 30th May, 1974, made in R.A. No. 172 of 1971. The appellants herein claimed ryotwari patta under section 9 of the Tamil Nadu Act (XXVI of 1963) on the basis that the inam in question was a new inam estate. The Assistant Settlement Officer III (Enquiries), Karaikudi, by

his order dated 29th May, 1970, held that the lands involved were private lands. Still he did not grant ryotwari patta to the appellants on the ground that they had not proved cultivation and possession for the requisite period as provided for under section 9 of the Act with regard to the new inam estate. On the other hand he held that the respondents would be entitled to ryotwari patta under section 11 of the Act, as the appellants were not entitled to get patta under section 9 of the Act. Against this order of the Assistant Settlement Officer, the appellants preferred an appeal before the Tribunal. The respondents contended before the Tribunal that the lands were ryoti lands and that they were entitled to ryotwari patta on that basis under section 10 of the Act. The Tribunal accepted this case of the respondents and reversed the finding of the Assistant Settlement Officer that the lands were private lands and held that the lands were ryoti lands and directed grant of patta under section 10 of the Act. It is against this order that the present appeal has been filed by the landholders.

2. At the outset Mr. T. Rangaswami Iyengar, learned counsel for the appellants contended that when the Assistant Settlement Officer had rendered a finding that the lands in question were private lands, it was not open to the Tribunal to reverse that finding and hold that the lands were ryoti lands, in an appeal preferred by the appellants themselves. According to the learned counsel, even though patta was granted to the respondents herein by the Assistant Settlement Officer under section 11 of the Act, since their claim that the lands were ryoti lands was rejected by the Assistant Settlement Officer, they should have preferred an appeal before the Tribunal and in the absence of an appeal by the respondents herein, the Tribunal had no jurisdiction to reverse the finding of the Assistant Settlement Officer that the lands were private lands. We are of the opinion that there is no substance in this contention. In the first place, once the Assistant Settlement Officer granted ryotwari patta to the respondents herein and against the said grant the appellants preferred an appeal, it was open to the respondents herein to support and sustain the order of the Assistant Settlement Officer on a ground put forward by them, but found against by the Assistant Settlement Officer. A perusal of the order of the Assistant Settlement Officer makes it clear that the respondents herein put forward a case that the lands were ryoti lands, but the Assistant Settlement Officer did not accept that case and, however, he granted patta only under section 11 of the Act. It must be noted that section 11 comes into operation only when no one is entitled to ryotwari patta in respect of a private land under section 9 and none is entitled to ryotwari patta in respect of a ryoti land under section 10. Consequently section 11 is more or less in the nature of a residuary section. Hence once the Assistant Settlement Officer found that the lands were private lands and the appellants were not entitled to ryotwari patta, because they had not proved possession and cultivation for the requisite period, the grant was naturally made by the Assistant Settlement Officer in favour of the respondents under section 11 (1) on the basis that the lands were only private lands. Consequently in an appeal preferred by the appellants herein, the respondents herein were entitled to put forward the contention that the Assistant Settlement Officer was wrong in holding that the lands were private lands and that he ought to have held that they were ryoti lands and that the respondents were entitled to ryotwari patta under section 10 (1) of the Act. In view of this, we are of the opinion that the Tribunal had jurisdiction to reverse the finding of the Assistant Settlement Officer with regard to the character of the lands.

3. As far as the second aspect is concerned, we are again of the opinion that the respondents herein could not have preferred an independent appeal against the order of the Assistant Settlement Officer, simply because the Assistant Settlement Officer had negatived their contention with regard to the character of the lands as ryoti lands. Section 12 of the Act deals with the determination of the question by the Settlement Officer and appeal against the said decision or determination. Sub-section (1) of section 12 states that the Settlement Officer shall examine the claims of any person for a ryotwari patta under section 9 or section 10 or section 11, as the case may be, and decide in respect of which lands the claim should be allowed. Sub-section (2) of section 12 which alone deals with appeal states:

> "Against a decision of the Settlement Officer under sub-section (1), the Government may, within one year from the date of the decision, and any person aggrieved by such decision may, within three months from the said date, appeal to the Tribunal."

Consequently, the person who can appeal to the Tribunal is one who is aggrieved by the decision of the Settlement Officer under section 12 (1). The decision of the Settlement Officer under section 12 (1) is as to in respect of which lands the claim for patta should be allowed. Therefore even though the respondents herein claimed ryotwari patta under section 10, once they were granted ryotwari patta under section 11, they could not be said to have been aggrieved by the decision of the Assistant Settlement Officer and therefore they could not have preferred an appeal against the order of the Assistant Settlement Officer, simply because the Assistant Settlement Officer had held that the lands were private lands and not ryoti lands. Hence we reject the contention of the learned counsel for the appellant that the Tribunal had no jurisdiction to hold that the lands were ryoti lands in an appeal preferred by the appellants herein against the order of the Assistant Settlement Officer, who had held that the lands were private lands.

4. However that does not dispose of the appeal. Once we have upheld the jurisdiction of the Tribunal to go into the question, the next question that arises for consideration is, whether the Tribunal was right in holding that all the lands involved were ryoti lands and that the respondents were entitled to ryotwari patta under section 10 of the Act. We are of the opinion that in this case the Tribunal had failed to perform its obligations. The Assistant Settlement Officer as well as the Tribunal were under an obligation to go into each item of the lands and to find out as to whether it is a private land or a ryoti land for the purpose of deciding the claim to ryotwari patta put forward by the parties. As we have pointed out already, the Assistant Settlement Officer held that all the lands were private lands, while the Tribunal held that all the lands were ryoti lands. In our opinion, this is over-simplification of the controversy between the parties. It is true that before the Assistant Settlement Officer the appellants put forward the claim that all the lands were private lands. From that it does not follow that if it is established that some of the lands were ryoti lands, the entire claim of the appellants must be thrown out. It is for the authorities below to examine which land was private land and which land was ryoti land and further examine with reference to such land, who was entitled to patta and under which provision. In this case the Tribunal has referred to and relied on Ex. R-53, which is a copy of the plaint filed in O.S. No. 97 of 1953 on the file of the Court of the Subordinate Judge, Sivaganga, against the notification made under the Tamil Nadu Act (XXX of 1947). In that plaint the landholders themselves had admitted that there were ryoti lands in the inam estate. The mere fact that the landholders themselves admitted that there were ryoti lands in the inam estate will not establish that all the lands in question were ryoti lands. Exhibit R-53 will only show that the appellants themselves have admitted that there were ryoti lands in the inam estate but that will not go to prove that there were no private lands at all in the inam estate.

5. Under these circumstances, we have no alternative but to allow the appeal and set aside the order of the Tribunal and remand the matter to the Tribunal for fresh disposal. The Tribunal shall find out whether all the lands in the estate are private lands or ryoti lands and if some of them are private lands or ryoti lands and if some of them are private lands and some of them are ryoti lands, the Tribunal shall further find out with reference to which private lands the appellants will be entitled to patta, if they satisfy the requirements of section 9 and in respect of which of the ryoti lands, each of the respondents will be entitled to ryotwari patta. If by any chance, the Tribunal is not in a position to decide the matter itself, it is certainly open to it to remand the matter to the Assistant Settlement Officer. Having regard to the fact that the matter is an old one, the Tribunal is directed to dispose of the matter as expeditiously as possible. The appeal is ordered accordingly. There will be no order as to costs.

R. S. ——— *Appeal allowed and matter remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Balasubrahmanyan, J.*

Pavunambal .. *Appellant**

v.

Ramaswamy and another .. *Respondents.*

Hindu Marriage Act (XXV of 1955), section 23 (1) (d)—Marriage in 1957—Petition by wife in 1974 to declare marriage a nullity—Trial Court recording finding that marriage was bigamous—Petition however dismissed on the ground of delay—Appeal by wife to District Court also dismissed—Further appeal to High Court allowed.

The marriage took place in 1957. The wife moved the Court in 1974 to have it declared a nullity on the ground that the husband was already married. By that time the husband was dead. The first wife also died in 1958. The learned Subordinate Judge recorded the evidence and at the end of the enquiry entered the finding that the marriage was bigamous. However, he dismissed the petition on the ground of delay. The learned District Judge, on appeal, took the same view. The wife filed an appeal to the High Court.

Held: It would be a mistake to suppose that the element of delay would override other considerations. In any case, the time-lag in instituting the proceedings could by no means be over-emphasised, but must be considered in the proper setting, and in the context of the various other statutory considerations the relative importance and cumulative effect of which the Court had to decide for itself in a reasonable and just fashion. [*Para.* 5]

It might be noticed that section 23 (1) (*d*) of the Hindu Marriage Act in terms, just did not refer to delay merely; what it cautioned against was "unnecessary" or "improper" delay. The former adjective might possibly have reference to the circumstances which, in given cases, might or might not amount to extenuating circumstances for the delay. The epithet "improper" would seem to indicate that the Court has to see if the delay has, in any material way, rendered it difficult for the Court to come to a reasonable satisfactory determination on the issues raised in the proceedings. [*Para.* 6.]

The fact that the learned Judge could record his finding in categorical terms must be proof that the passage of time had not corroded either the sources of evidence or the means available for their evaluation. [*Para.* 6].

The dismissal was both unnecessary and improper. The appeal was accordingly allowed. [*Paras.* 7 *and* 8.]

Appeal against the order of the District Court of South Arcot at Cuddalore dated 15th July, 1975, and made in C.M.A. No.4 of 1975 preferred against the order dated 5th December, 1974, in O.P.No. 142 of 1974 on the file of the Court of the Subordinate Judge, Chidambaram.

M. Srinivasan, for Appellant.

The Court delivered the following

JUDGMENT.—This appeal raises a point about delay in the filing of proceedings for nullifying a marriage. The marriage took place a number of years ago, in 1957. The wife, wishing to have it declared a nullity, moved the Court in 1974 after 17 years had passed. By that time the husband had been dead for nearly 11 years. The ground taken by the petitioner was that at the time of her marriage the husband was already married. This other wife died in 1958, but she was alive when her husband had taken the petitioner in marriage.

2. The learned Subordinate Judge, before whom the petition was filed, heard the petitioner and recorded her evidence. At the end of the inquiry he entered the finding that the marriage was bigamous. All the same, however, he dismissed the petition on the score that it was belated and it had to be dismissed under the law on that ground. On appeal, the learned District Judge took precisely the same line. He characterised the delay as unconscionable and dismissed the petition.

3. The contention urged in this appeal is that the Courts below ought not to have denied the petitioner the relief which their findings merited solely on the ground of delay.

4. The matter falls to be decided under the provisions of the Hindu Marriage Act, 1955. Section 23 of that Act tells the Courts how and in what manner they should give a disposal to proceedings filed before them under the Act. Clause 1 (*d*) in that section, *inter alia*,

* A.A.A.O. No. 63 of 1976. *24th August*, 1978.

says that the Court may decree the petition and grant relief "if there has not been any unnecessary or improper delay in instituting the proceedings". The Courts below had apparently invoked this cautionary provision when they proceeded to dismiss the wife's petition. Each in his own mind seemed quite definite that the delay in this case was unnecessary and improper. One of them even remarked that the petitioner had not come forward with any explanation for the delay. Even so, it seems to me that they have fallen into an error in making much of the delay. I do not mean to question their personal assessments of the time-lag. Whether 17 years or 11 years would amount to unnecessary or improper delay is not, as I conceive it, the whole point of this appeal. For it is just possible to view a question of that kind as one of degree and therefore, as one of fact. But what has struck me rather as an altogether wrong approach in these proceedings, so far, is that the Courts below should have treated the aspect of delay as quite an overriding consideration for the disposal of the petition. It is plain to see what the result of this approach has been. It has been quite unfortunate for the petitioner, if the issue on merits were considered. On that issue there is on record, a finding which is entirely in the petitioner's favour. According to this finding, " it is clear that the petitioner married Anakarudu as his second wife, while the first wife Arumbu was alive. As such, this marriage is null and void under section 11 of the Hindu Marriage Act." If so much is granted, it certainly provokes one to ask why the Courts below should at all have felt compelled to dismiss the wife's petition on the ground of delay? My answer is that they had no call to do so.

5. Section 23, as I said, lays down how Courts of law must proceed to dispose of matrimonial causes filed before them under the Act. Sub-section (1) sets down what the relevant considerations in this regard ought to be. Those considerations, indeed, are many and various. Clause (*a*) for instance asks the Courts to go into the grounds urged in the petition and go behind them to see if the petitioner is seeking to gain an advantage by his or her own wrongs. Clause (*b*) says that the Courts must satisfy themselves that the petitioner is not a party or privy to the very wrong-doing complained of. Clause (*d*) cautions that the Courts should steer clear of collusive actions. Clause (*e*) asks the Courts to see if there is any other legal impediment to relief being granted. Clause (*d*) requires the court, to find out if there had been any undue delay in the institution of the proceeding. It is easy to see that in this fasciculus of statutory requirements, the aspect of delay, as an element that goes into decision-making, is only one of the many considerations that the Courts are enjoined to keep in mind. It would, I think, be a mistake to suppose that the element of delay can override other considerations. In any case, the time-lag in instituting the proceedings can by no means be over emphasized, but must be considered in the proper setting, and in the context of the various other statutory considerations the relative importance and cumulative effect of which the Court has to decide for itself in a reasonable and just fashion.

6. The clause cautioning the Courts against entertaining petitions which are long delayed can by no means be regarded as imposing a bar of limitation of some kind or other. Indeed, the Act imposes no time-limit whatever on proceedings under section 11. Nevertheless, if Parliament has thought fit to caution the Courts against delay in the institution of matrimonial causes even where they invoke section 11, the reason cannot be far to seek. Any one with experience in these matters can tell that causes coming before the marriage division in Courts require proof of a kind which, normally, is rare to come by and seldom direct and uninhibited even where it comes. In this context, there is always the risk that the evidence and its sources may get blurred or obfuscated or even lost altogether with the lapse of time. This is the reason why matrimonial causes are required to be judged by Courts on the basis also of the time-factor between the cause of action and the institution of the petition. If this is the real rationale behind the provision, as I believe it is, then the mere passage of time or its length alone cannot be a decisive factor in every case. It would really depend on the effect of the delay on the quantum or quality of the evidence or the credibility of the witnesses that actually figure in the given inquiry. It might be noticed, in this connection, that section 23 (1) (*d*) in terms, just does not refer to delay merely; what it cautions against is "unnecessary" or "improper" delay. The former adjective might possibly have reference to the circumstances which, in given cases, might or might not amount to extenuating circumstances for the delay. The epithet "improper" would seem to indicate that the

Court has to see if the delay has, in any material way, rendered it difficult for the Court to come to a reasonably satisfactory determination on the issues raised in the proceedings. In the present case, the petitioner marked documents at the trial and set out to prove not only her marriage, but that of her husband's first wife. I have earlier extracted the finding on merits which the learned Subordinate Judge had come to on an evaluation of this evidence. That finding has left no room whatever to doubt that the petitioner's marriage was a nullity in view of the subsistence of an earlier marriage. The fact that the learned Judge could record his finding in such categorical terms must be proof that the passage of time had not corroded either the sources of evidence or the means available for their evaluation. Indeed, neither of the Courts below had so much as suggested that the delay, long though it might be, had tended to affect the evidence at the inquiry or had handicapped them in their perception and evaluation of the materials. Nor was there any impropriety suggested in the wife's suing for nullity after the husband's death. The reported decisions noticed by the Courts below bear out that law places no bar in the way of widows, or, for that matter, widowers, to obtain requisite relief from the Courts in matrimonial cases. It seems to me therefore that what had got hold of the Courts below in this case was their obsession over the mere length or passage of time of 17 years, 11 years and the like. But I have said enough already to show that the statute does not demand this approach, and the Courts below were quite wrong in thinking they were under some duty bound to dismiss a petition once they had held that there was an improper or excessive delay in its institution.

7. Strictly speaking, the conception of delay can be properly understood only with reference to some definitely laid-down standard or test of promptitude. I have earlier mentioned that this statute does not lay down any such norm, not, at any rate, under section 11. This, therefore, renders a judicial finding as to delay in any matrimonial proceeding for nullity difficult and arbitrary under any circumstances. If there is no precise time prescribed for filing a petition, how can a Court say that any given proceedings involves delay to any extent, let alone improper or unnecessary delay? And, pray, what is a 'necessary' delay, any way? If it is necessary, can it be delay. These, however, are questions for which it is not necessary to provide answers in this case. The discussion on such questions might even be closed or gently marked by saying, sententiously, that this matter really must turn on the facts of each case. For instance, I myself may not, in the context, be as dogmatic as the Courts below evidently were in characterising the delay in this case as unconscionable or improper or unnecessary. But even assuming that 17 years is much too long a period, still the question is whether it warrants the Courts in sending the petitioner back empty-handed, when they had found on evidence that her bigamous marriage was clearly a nullity. My answer, to repost, is that the dimissal of the petition was unwarranted. The dismissal was both unnecessary and improper, if I may misuse the statutory phrases.

8. The appeal is accordingly allowed. The orders of the Courts below are reversed. The petitioner shall have a decree for nullity of her marriage with Anakarudu as prayed for in her petition. There will, however, be no order as to costs.

S.J. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Mohan and T. Sathiadev*, *JJ.*

Madras Machine Tools Manufacturers, Singanallur, Coimbatore-5 .. *Petitioner**

v.

The Special Deputy Commissioner of Labour, Chepauk, Madras 5 and another .. *Respondents.*

Industrial Disptues Act (XIV of 1947), *sections* 10-*A* (3-*A*), 17-*A—Industrial dispute—Award passed—Agreement not forwarded to Government for consideration and publication—Want of publication under section* 17-*A—Effect—Award declared invalid.*

16 temporary workmen raised an industrial dispute claiming lay-off compensation for their non-employment from 25th April, 1975. On 8th January, 1977, a settlement was reached before the Deputy Commissioner of Labour, Coimbatore, whereby the parties agreed to refer a particular issue for arbitration by the Special Deputy Commissioner of Labour, Madras. An award was passed on 5th November, 1977. That award was challenged by the management on the ground that a copy of the agreement entered into under section 10-A (1) of the Industrial Disputes Act was not forwarded to the Government for consideration and publication in the Official Gazette as required under section 10-A (3-A). Further the award did not become enforceable for want of publication under section 17-A of the Act.

Held: Having regard to the admitted fact of non-compliance with section 10-A (3-A) the award was invalid. It was also admitted that there had not been any publication under section 17-A of the Act. That being so, it could not be enforced. In view of this, the writ petition was allowed. [*Para.* 9.]

Cases referred to :—

Workmen of Woodlands Hotel v. *K. Srinivasa Rao*, (1972) 42 F.J.R. 223; *Rosbehary Mohanty* v. *Presiding Officer, Labour Court*, (1974) 45 F.J.R. 474; *Singh* v. *Gokhale*, (1970) I Lab.L.J. 125; *R. K. Steels* v. *Their Workmen*, (1977) 1 Lab.L.J. 382.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 1st Respondent in his proceedings No. S2/8825 of 1977 and quash his award dated 5th November, 1977.

T.S. Gopalan and *S. Ranganathan*, for Petitioner:

The Government Pleader, *Row* and *Reddy*, *K. Chandran* and *R. Rajaram*, for Respondents.

The Judgment of the Court was delivered by

Mohan, J.—This writ petition is for *certiorari* to quash the award dated 5th November, 1977 of the first respondent. The petitioner is engaged in the manufacture of lathes and textile machinery having its factory at 8/146-B Tiruchy Road, Singanallur Post, Coimbatore-5. It has a complement of about 250 permanent workmen. Over and above this, the petitioner also used to engage temporary workmen out of a pool of 100 temporary workmen depending upon the exigencies of work. The employment of temporary workmen was only for specific periods and at the end of each such period, their employment would automatically come to an end. In the years 1973 and 1974, owing to recession in the Engineering and Textile industry and power shortage, the petitioner was obliged to lay-off its permanent workmen for many days and consequently there was no scope for employment of any of the temporary workmen. An industrial dispute was raised with regard to the non-employment of 20 out of 100 temporary workmen and the said dispute was referred to the Labour Court, Coimbatore as Industrial Dispute No. 7 of 1974. By the time the dispute was ripe for hearing, the position slightly improved and there were opportunities for engagement of temporary workmen. In fact, among the temporary workmen engaged, 10 were covered by I. D. No. 7 of 1974 and they were provided with employment. But there was also an agreement to provide employment for 10 other temporary workmen. However, only six turned up for work.

2. On and from April, 1975, due to lack of orders and unsatisfactory financial position of the petitioner, work could not be provided even to the permanent workmen. Naturally,

* W.P.No. 925 of 1978. 7th March, 1979.

the temporary workmen also could not be engaged. 50 temporary workmen filed claim petitions before the Labour Court claiming lay-off compensation from 25th April, 1975. The Labour Court, Coimbatore passed orders on 13th July, 1976, holding that these temporary workmen had not put in one year of continuous service within the meaning of section 25-B of the Industrial Disputes Act (hereinafter called as the Act) and hence they were not entitled to lay-off compensation under section 25-C of the Act. The Labour Court further found that these workmen had not reported themselves to work on all days during the period for which lay-off was claimed. Ultimately, their claims were rejected.

3. 16 of the temporary workmen who were parties to the dispute in I.D. No. 7 of 1974, raised an industrial dispute claiming lay-off compensation for their non-employment from 25th April, 1975. On 8th January, 1977, a settlement was reached before the Deputy Commissioner of Labour, Coimbatore where the parties agreed to refer the following issue for the arbitration by the Special Deputy Commissioner of Labour, Madras, the first respondent herein:

4. Whether the sixteen workmen mentioned in the annexure ought to have been provided with regular and continuous work from 25th April, 1975, and thereafter, if so whether they are entitled to lay-off compensation for the period on or after 25th April, 1975.

5. An agreement was signed before the Deputy Commissioner, Labour, Coimbatore, on 8th January, 1977, and thereafter, an award came to be passed on 5th November, 1977. It is the validity of this award which is now questioned before us.

6. According to the writ petitioner, this award is invalid because a copy of the agreement entered into under section 10-A (1) was not forwarded to the Government for consideration and publication in the Official Gazette as required under section 10-A (3-A). Further the award does not become enforceable for want of publication under section 17-A of the Act. In support of this submission, the learned counsel for the writ petitioner cites the decision of the Mysore High Court reported in *Workmen of Woodlands Hotel* v. *Srinivasa Rao*,[1] and also the decision in *Rasbehary Mohanty* v. *Presiding Officer, Labour Court*,[1] Further citation is made of the decision of the Madhya Pradesh High Court reported in *Singh* v. *Gokhale*[2]. Lastly, our attention is drawn to a Full Bench judgment of this Court reported in *R. K. Steels* v. *Their Workmen*.[3] On these decisions, it is contended that the violation of the statutory requirements under section 10-A and section 17-A read with rules 26, 27 and 27-A of the Tamil Nadu Industrial Disputes Rules, would render the award invalid and unenforceable.

7. The question that arose before the Full Bench was whether an award under section 10-A of the Act would be amenable to writ jurisdiction under Article 226 of the Constitution of India. The question whether as to what is the effect of non-compliance with the specific provisions of section 10-A (3), (3-A), did not come up for consideration in that case. However, a reference is made to section 10-A (3) and it is held that the non-compliance with the same would not render the agreement invalid. Even assuming that the decision is an authority for this position, the scope of the decision cannot be extended to the awards under section 10-A. In any event, therefore, so far as there is no valid award much less, an enforceable award, the claim petitions which have been filed pursuant to the award are invalid.

8. As against this Mr. N.G.R. Prasad, learned counsel for the second respondent, strenuously relying upon the Full Bench decision contends as under:

(1) The question that arose before the Full Bench was about an award under section 10-A of the Act being amenable to writ jurisdiction and nothing more than that;

(2) If the ruling of the Full Bench has to be accepted and this Full Bench being bound by the said decision, in so far as the Full Bench has held that the non-compliance of section 10-A (3) of the Act would not render the arbitration agreement illegal, the scope of this decision must be logically extended to section 10-A (3-A) and to other sub-sections of section 10-A;

(3) In any event, if section 10 (3) is held to be directory, equally so will be section 10-A (3-A) and section 10-A (4-A). Perforce the same argument would apply to section 17-A; and

1. (1972) 42 F.J.R. 223.

1. (1974) 45 F.J.R. 474.
2. (1970) 1 L.L.J. 125.
3. (1977) 1 L.L.J. 382.

lastly, the argument under section 12 (3), it is not amenable to writ jurisdiction. However, in view of the Full Bench decision, the above submissions are made without prejudice to this submission.

In order to appreciate the respective contentions, let us refer to the relevant statutory provisions in this regard. Section 2 (*b*) contains the definition of award, which reads thus:

"'Award' means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Industrial Tribunal and includes an arbitration award made under section 10-A."

Section 10-A and its related rules 26, 27 and 27 (*a*) of the Tamil Nadu Industrial Disputes Rules: Section 10-A reads thus:

"10-A. (1) Where any industrial dispute exists or is apprehended and the employer and the workmen agree to refer the dispute to arbitration, they may, at any time before the dispute has been referred under section 10 to a Labour Court or Tribunal or National Tribunal, by a written agreement, refer the dispute to arbitration and the reference shall be to such person or persons (including the Presiding Officer of a Labour Court or Tribunal or National Tribunal) as an arbitrator or arbitrators as may be specified in the arbitration agreement.

(1-A) Where an arbitration agreement provides for a reference of the dispute to an even number of arbitrators, the agreement shall provide for the appointment of another person as umpire who shall enter upon the reference, if the arbitrators are equally divided in their opinion, and the award of the umpire shall prevail and shall be deemed to be the arbitration award for the purposes of this Act.

(2) An arbitration agreement referred to in sub-section (1) shall be in such form and shall be signed by the parties thereto in such manner as may be prescribed.

(3) A copy of the arbitration agreement shall be forwarded to the appropriate Government and the conciliation officer and the appropriate Government shall, within (one month) from the date of the receipt of such copy, publish the same in the Official Gazette.

(3-A) Where an industrial dispute has been referred to arbitration and the appropriate Government is satisfied that the persons making the reference represent the majority of each party, the appropriate Government may, within the time referred to in sub-section (3) issue a notification in such manner as may be prescrib d; and when any such notification is issued, the employers and workmen who are not parties to the arbitration agreement but are concerned in the dispute, shall be given an opportunity of presenting their case before the arbitrator or arbitrators.

(4) The arbitrator or arbitrators shall investigate the dispute and submit to the appropriate Government the arbitration award signed by the arbitrator or all the arbitrators, as the case may be.

(4-A) Where the industrial dispute has been referred to arbitration and a notification has been issued under sub-section (3-A), the appropriate Government may, by order, prohibit the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of the reference.

(5) Nothing in the Arbitration Act, 1940, shall apply to arbitrations under this section".

Rule 26 runs as follows:

"Arbitration agreement. An arbitration agreement for the reference of an industrial dispute to an arbitrator or arbitrators shall be made in Form "D" and shall be delivered personally or forwarded by registered post to the Secretary to the Government of Madras in charge of Labour (in triplicate), the Commissioner of Labour, Madras, and the Conciliation Officer concerned. The agreement shall be accompanied by the consent, in writing, of arbitrator or arbitrators."

Rule 27 runs thus:

"Attestation of the Arbitration Agreement. The arbitration agreement shall be signed (*a*) in the case of an employer, by the employer himself, or by its authorised agent or when the employer is an incorporated company or other body corporate, by the agent, manager or other principal officer of the Corporation; and (*b*) in the case of workmen, either by the President or Secretary of trade union of workmen or by two office-bearers of the union authorised by the President or

Secretary, or by five representatives of the workmen duly authorised in this behalf at a meeting of the workmen held for the purpose and attended by a majority of the workmen concerned. Provided that where the number of workmen affected is not more than 5, the agreement may be signed by all the workmen concerned. (c) in the case of an industrial dispute raised in pursuance of section 2-A by the workmen concerned.

27-A. Notification regarding arbitration agreement by majority of each party. Where an industrial dispute has been referred to arbitration and the State Government is satisfied that the persons making the reference represent the majority of each party, it shall publish a notification in this behalf in the Official Gazette for the information of the employers and workmen who are not parties to the arbitration agreement, but are concerned in the dispute."

9. On a reading of this section 10-A of the Act, it appears to us that there are two stages contemplated under the said section, one is the stage of agreement and the other is the stage of award. The Mysore High Court in very categoric terms in *Workmen of Woodlands Hotel* v. *K. Srinivasa Rao* [1], has laid down that the failure to follow the procedure under section 10-A (3) *viz.*, the non-publication thereof would render the award invalid. Likewise, is the decision in *Rasbehary Mohanty* v. *Presiding Officer, Labour Court*[2]. The same position is derived by a reading of the decision in *Singh* v. *Gokhale*[3]. However, the Full Bench of this Court in *R. K. Steels* v. *Their Workmen*[4], states thus:

"The argument that in the instant case the arbitration agreement was not forwarded to the Government or the other officers referred to in sub-section (3) of section 10-A and that the agreement or the award also was not published in the Gazette, showed that the parties deliberately did not want to avail the provisions of section 10-A could not be accepted as that will amount to putting the cart before the horse. The Government comes into the picture only after the arbitration agreement had been entered into under section 10-A (1) and signed by the parties as required under section 10-A (2). If once that is done, there is a valid arbitration agreement, and non-compliance with the other provisions of section 10-A or any other provisions in the Act relating to publication of the award will not invalidate or take the arbitration agreement itself outside the purview of section 10-A".

We may at once state that the question that arose before the Full Bench was whether an arbitration award rendered under section 10-A of the Act would be amenable to writ jurisdiction. Nevertheless, the effect of non-compliance or section 10-A (3) came to be considered as seen from the above extract and the Full Bench seems to suggest that the non-compliance of section 10-A (3) could not render the arbitration agreement (emphasis supplied) invalid. Bound, as we are, by the Full Bench, we will have to limit the scope of the judgment only to the stage of agreement and cannot extend it beyond its frontiers in other words, to the domain of award. If section 10-A (3-A) is not complied with, we fail to understand how an award could ever be characterised as valid. There is an important legal consequence if section 10-A (3-A) is not complied with, that being the failure of the Government to issue a notification under section 10-A (4-A) of the Act. In other words, if there is a strike or lock-out, no notification under section 10-A (4-A) can be issued prohibiting the continuance of that strike or lock-out. In such a case, if it is held that section 10-A (3-A) is not a mandatory requirement, will it not jeopardise the industrial peace and harmony and will not the Government lose its jurisdiction to issue a notification under section 10-A (4-A). For all these reasons, we restrict the scope of our judgment to the stage of agreement as regards the non-compliance with section 10-A (3). As a matter of fact, the judgments of the other High Courts *viz.*, Mysore, Orissa and Madhya Pradesh are directly on point. We therefore hold that having regard to the admitted fact of non-compliance with section 10-A (3) the award is declared to be invalid. It is also admitted that there has not been any publication under section 17-A of the Act. If that be so, it cannot be enforced. In view of this, we allow the writ petition. However, we may observe that it will be open to the parties to take such steps as are available to them under law to make the award valid and enforceable. No costs.

S.J. —— *Petition allowed.*

1. (1972) 42 F.J.R. 223.
2. (1974) 45 F.J.R. 474.
3. (1970) 1 L.L.J. 125.
4. (1977) 1 L.L.J. 382 at p. 386.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

The Executive Officer of Sri Ranganathaswami Devasthanam, Sri Rangam appointed as Fit person to manage the Plaint Trust Estate, The name of Rathnam deleted as per order dated 20th January, 1978 in C.M.P. No. 11911 of 1975 .. *Appellant**

v.

Sri Sehsa Iyengar Hamsa Vahana Mandagapadi Private Family Trust Estate by Hereditary Trustee and Manager S. Parthasarathy Iyengar .. *Respondent.*

(A) *Hindu Religious and Charitable Endowments Act (XXII of 1959), sections 6 (19), 64 (1) and 108—'Specific Endowent' — Definition — Property endowed for performance of service in temple—Endowment not of any specified income from property, if a specific endowment—Whether scheme can be framed under the provisions of the Act.*

(B) *Hindu Religious Endowments Act (II of 1927), section 84 (2)—Decision rendered by the Hindu Religious Endowments Board—Persons affected not taking steps to modify or set aside—Finality of decision.*

Held: In the temple in question every year the temple prepares a *thittam* and calls upon the person in management of the suit property to meet the expenses as mentioned in the said *thittam*. The said expenditure statements which are given beforehand to the persons in management of the trust refer to the expenses on items like fire-works, the decoration of the mandapam and thirumanjanam of the deity etc. The Mandagapadi is performed when the deity goes in procession in *Hamsa Vahanam*. The furnishing of statements of expenditure beforehand by the Devasthanam indicates that the expenditure is met by the Devasthanam and the trustee who is in charge of the suit property was to reimburse the amount. From the recitals in the document and the evidence on record it appears that *Hamsa Vahanam* Mandagapadi festival is conducted in the temple every year on the second day of Boopathi Thirunal in the month of Thai and the family of the founder had undertaken to meet the cost of performing the said Mandagapadi festival once in three years. In this view of the matter for which the property has been endowed by the family of the respondent it is a religious service rendered in the temple. This will clearly attract the definition of "specific endowment". [*Para.* 9.]

In this case, the property has been endowed for the performance of service in a temple and the endowment is not of any specified income from a property or any specified amount but the property itself. Once it is a specific endowment, a scheme can be framed by the Deputy Commissioner, Hindu Religious and Charitable Endowments under section 64 (1) read with the *Explanation* thereto which refers to a specific endowment attached to a temple. In this case, though a decision has been rendered by the Board that the suit trust was a specific endownment, the persons affected by that decision had not chosen to take steps to modify or set aside the order. Thus the order passed by the Board had become final. The respondent, therefore could not now in these proceedings challenge the jurisdiction of the Hindu Religious and Charitable Endowments Board to initiate proceedings for the framing of a scheme in view of section 108 of Act XXII of 1959, which says that no suit or other legal proceedings in respect of the administration or management of a religious institution or any matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except under, and in conformity with, the provisions of the Act. The definition of religious institution includes a specific endowment and the present suit is not a suit filed in conformity with provisions of the Act which provides for filing of a suit only in cases coming under section 70 of the Act. The present suit has not been filed under section 70. Hence the suit should be taken to be barred by section 108. [*Paras.* 9 *and* 10.]

Cases referred to:—

Muthu Pillai v. *Arumugathammal*, (1970) 1 M.L.J. 349; *Hindu Religious and Charitable*

* S.A. No. 96 of 1975. *2nd March*, 1979.

Endowment, Madras v. *Boalavaraja Santhiappa Mandagapadi*, (1972) 85 L.W. 434; *Sri Kallalagar Trust* v. *Maruthamalai Ambalam*, (1959) 72 L.W. 646.

Appeal against the decree of the Court of the Subordinate Judge, Tiruchirapalli in Appeal Suit No. 509 of 1972, preferred against the decree of the Court of the District Munsif, Tiruchirapalli in Original Suit No. 68 of 1969.

R. Gopalaswami Iyengar and *M. Srinivasan*, for Appellant.

K. Sarvabhauman and *K. Sampath*, for Respondent.

The Court delivered the following

JUDGMENT.—The appellant herein is the Executive Officer of the Sri Ranganathaswami Devasthanam, Srirangam who has been appointed as the fit person to manage the suit trust. An extent of 6-65 acres of wet lands in survey No. 229/2 of Thirumanamedu village originally belonged to one Sesha Iyengar. Under Exhibit A-1 dated 22nd July, 1980, Sesha Iyengar and his sons, while dividing all their joint family properties, set apart the said 6-65 acres of land for the purpose of performing the Hamsa Vahana Mandagapadi to Lord Sri Ranganatha once in three years on Boopathi Tirunal of Sri Ranganatha which falls on the second day of the month of Thai. As per the said partition deed, Sesha Iyengar during his lifetime, and after his death his eldest surviving male descendants had been managing the said property and conducting the Mandagapadi from and out of the income therefrom once in three years. Subsequently disputes arose between the members of Sesha Iyengar's family. The result was that proceedings were initiated *suo motu* by the Deputy Commissioner, Hindu Religious and Charitable Endowments under section 64 (1) of the Hindu Religious and Charitable Endowments Act, 1959, hereinafter referred to as the Act, for framing of a scheme and for the appointment of a fit person during the pendency of the scheme proceedings. In those proceedings the Executive Officer, Sri Ranganathaswami Devasthanam, Srirangam has been appointed as the fit person under Exhibit B-1 M.P. No. 16 of 1968. Proceedings for framing of a scheme are still pending. Aggrieved against the order appointing the fit person, the respondent herein filed O.S. No. 68 of 1969 on the file of the District Munsif, Tiruchirapalli.

2. His case was that the trust in question is a private trust, that the senior-most male member of the family is entitled to be in possession of the land and perform the Mandagapadi that as such the appointment of a fit person by the Deputy Commissioner is without jurisdiction and that, therefore, he is entitled to a permanent injunction restraining the fit person appointed by the Deputy Commissioner from taking possession of the lands and his performing the Hamsa Vahana Mandagapadi from the income therefrom.

3. The appellant resisted the suit contending that the trust in question is a public trust, that for the last two decades there has been submission to the jurisdiction of the endowments department by the persons in management of the said public trust, that in any event the suit is barred by the provisions of the Act and that, therefore, the appointment of a fit person had been validly made and there is no question of issuing an injunction against the fit person.

4. The trial Court, on a consideration of the evidence adduced in the cane found that though the trust in question is a private one, the suit cannot be maintained as there has been submission to the jurisdiction of the Endowments Department by persons in management of the trust and therefore the plaintiff-respondent has to resort to the remedies provided under the Act. On appeal by the plaintiff, the lower appellate Court held that as the trust in question is a private one, the provisions of the said Act are not applicable to it and that the mere fact that some of the descendants of the original founder Sesha Iyengar submitted to the jurisdiction of the Endowments Department will not constitute a bar for the present suit. In this view, the lower appellate Court decreed the suit.

5. In this second appeal, Mr. Gopalaswami Iyengar, learned counsel for the appellant questions the findings of both the Courts

below that it is a private trust. He also questions the view of the lower appellate Court that the provisions of Tamil Nadu Act XXII of 1959, will not bar the suit. According to the learned counsel, the trust in question comes under the definition of "specific endowment" as defined in section 6 (19) of the Act, that, therefore the said trust has to be governed by the provisions of the said Act, and that the decision of the Courts below that it is a private trust cannot at all be sustained. It is also pointed out that at an earlier stage proceedings were initiated in the year 1944 for the framing of a scheme under the Hindu Religious Endowments Act, 1927, that in those proceedings it has been specifically held by the Endowments Board that the trust is a public trust falling within the definition of "specific endowment", and that the said decision having become final, it is no longer open to the respondent to contend that the trust in question will not come within the purview of Act XXII of 1959.

6. In this case the partition deed Exhibit A-1 under which the suit property has been set apart for the performance of the said Mandagapadi, treats the property as having been dedicated or endowed for a Kattalai. The relevant portion of Exhibit A-1 is as follows:

"நான் 10-நம்பர் ஷெடியூலில் கண்ட சொத்தை நாம் 8 பேருமாக சம்மதித்து ஸ்ரீரங்கம் ரங்கநாதஸ்வாமிக்கு தை உற்சவம் 2 திருநாளில் நடந்து வருகிற மண்டகப்படி செலவுக்கு வைத்துவிட்டபடியால் ஷை நிலத்தின் வரும்படியைக் கொண்டு நம்முடைய தகப்பனார் சேஷய்யங்கார் உள்ள வரையில் நடத்திக்கொண்டு வரவேண்டியது. அவர் காலத்திற்குப் பிறகு அவரது சந்ததியாரில் யார் பெரியவனாக இருக்கிறானோ அவன் ஷை நிலத்தை வருஷா வருஷம் தகுந்த குத்தகைக்கு அடைத்து குத்தகையை வசூல் செய்து வாய்தா முதலானது செலுத்தி பாக்கிப் பணத்தைக் கொண்டு மூன்று வருஷத்திற்கொரு தடவை நடந்து வருகிற மண்டகப்படியை குறைவர நடத்தி மற்ற பாகஸ்தருக்கும் தேவஸ்தானத்தில் ஏற்பட்டிருக்கிற மரியாதையை செய்வித்து ஸ்வாமி பிரசாதங்கள் முதலானதும் கொடுத்துக் கொண்டு வரவேண்டியது. ஷை தர்ம சொத்தை நாம் எல்லோரும் பாகித்துக் கொள்வதினின்றும் நீக்கி தர்மத்திற்காகவே என்று சம்மதித்து விட்டு விட்டபடியால இனி நமக்காவது நம்முடைய சந்ததியாரில் யாருக்காவது ஷை சொத்தை விட்டு, ஒத்தி, சாசனம் முதலானதும் செய்ய கொஞ்சமேனும் பாத்தியமில்லை".

The above extract indicates that the property has been dedicated to the charity which is the performance of the Mandagapadi. The above recitals in Exhibit A-1 have been construed by both the Courts below as not creating an endowment or constituting a complete dedication. According to them a charge alone is created over a portion of the income from the property leaving the balance of the income to be used for the maintenance of the members of the family. I am not able to agree with the view taken by both the Courts below that there is no dedication or endowment of the suit property for the Mandagapadi and that the dedication is only partial in that a charge is created in respect of the income from the property for the specified purpose of conducting the Mandagapadi. I am also not inclined to accept the view of the Courts below that the beneficiaries under the trust are only members of the family and not the general body of worshippers in the temple. A reading of the document, Exhibit A-1 as a whole would indicate that the entire suit property has been set apart for the purpose of defraying the expenses of the Mandagapadi, that the said land cannot be partitioned at any time and it has to remain as a trust property, and that none of the members of the family nor their descendants can deal with or encumber the same. A reading of Exhibit A-1 also suggest that the net income from the property, after paying the public charges has to be spent for the Mandagapadi which has to be performed once in three years. There is no provision that if there is any balance of income after defraying the expenses of Mandagapadi, the members of the family can have the benefit of the same. I do not see any justification for the view taken by the Courts below that the entire income is not contemplated to be spent for the Mandagapadi. In my view the entire corpus has been dedicated, and no right has been reserved for the members of the family except the right of management of the property and the right to conduct the

Mandagapadi out of the income therefrom. It is also not possible to agree with the view of the Courts below that merely because the family members are entitled to certain honours at the time of the performance of the Mandagapadi, the beneficiaries are the members of the family alone. The performance of the Mandagapadi is for the benefit of the entire worshipping public. The mere fact that the document does not refer to the quantum of the income and the expenditure necessary for performing the Mandagapadi cannot, by itself indicate that the persons who created the trust wanted to reserve the benefit for the family in the balance of the income, if any, after defraying the expenses of the Mandagapadi. Further, the lower appellate Court has given a somewhat curious reasoning to hold that it is a private trust and the reasoning is this: The eldest member of the family is to manage the property, receive the income and perform the Mandagapadi and he is under no obligation to account for the income received and the amount spent for the festival. There is no scope for the expansion of the charity and there is no provision dealing with the surplus income. As already pointed out, the document does not say that there is any balance income after defraying the expenses of Mandagapadi, that will go to the benefit of the members of the family. Therefore it has to be assumed that the income from the trust property will have to be spent only for the performance of the Mandagapadi. If there is a surplus income in any particular year, the Mandagapadi has to be conducted in a grand scale. It must also be remembered that the document does not provide any maximum limit for the expenditure to be incurred in connection with the performance of the Mandagapadi. Therefore one has to naturally assume that the entire expenditure has to be spent only for the performance of the Mandagapadi. The Courts below have also proceeded on the basis that there is no divestiture of ownership in the property and there is no dedication in favour of Lord Ranganathaswami. Even assuming that there is no dedication in favour of Lord Ranganathaswami, there has been a dedication for performance of religious charity and such dedication for a specified object of a religious or charitable nature is recognised in law. The Courts below are not therefore right in saying that there is no divestiture of ownership. Exhibit A-1 clearly sets apart the suit property as the property the income of which has to be spent for the purpose of the Mandagapadi in the temple of Sri Ranganathaswami and it is also made clear that the property set apart is ' *தர்ம சொத்து* ' and the members of the family or their descendants have no right over the property except to collect the income therefrom and spend the same for the Mandagapadi. Whoever is in possession of the property and conducts the Mandagapadi should be taken to be a trustee and therefore there is a complete divestiture of the property under Exhibit A-1. The entire reasoning of the Courts below on this aspect of the case is not possible of acceptance.

7. The Courts below have relied on the decision in *Muthu Pillai* v. *Arumugathammal*[1], in support of their stand. But I do not see how that decision can be applied to the facts of this case. In that case there was a gift of a property for the worship of an idol and the deed contained a clause that in the event of there being a surplus after meeting the daily worship of the idol, it should be applied for the support of the family. The Court held that the property was only burdened with a charge and there was no absolute dedication. As already stated, in this case, there is no provision for dealing with the excess income and the members of the family are not to derive any benefit from the trust property or income therefrom. The entire income from the property has been specifically earmarked for the performance of the Mandagapadi. As there is no beneficial interest granted to the members of the family, it is not possible to apply the said decision and say that in this case the property has only been subjected to a charge for the performance of the Mandagapadi. The decision in *Commissioner of Hindu Religious and Charitable Endowment, Madras* v. *Boalavaraja Santhiappa Mandagapadi*[2], appears to be in point. In that case on endowment was created providing that the

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1. (1970) 1 M.L.J. 349.
2. (1972) 85 L.W. 434,

income from the property endowed to Sri Subramaniaswami and Meenakshisundareswaraswami was to be utilised for receiving the Utsava Vigraham on Panguni Uthiram Thirukalyanam day at the Mandapam, where the deities were received with honours and after the deities leave the Mandapam, Brahmins have to be fed. The trustee of the said endowment filed a suit contending that the suit property constituted neither a religious endowment nor a religious institution so as to attract the provisions of the Act and that it is not liable to pay audit fee under section 92 of the Act. It was held that though the endowment will not constitute a religious institution such as a Math, temple of a specific endowment, it will be a religious endowment which is defined as any property belonging to or given or endowed for the support of Maths or temples or given or endowed for the purpose of performance of any service or charity of a public nature connected therewith or of any other religious charity. It was observed in that case that the performance of Mandagapadi to the Utsava idol taken from Meenakshisundareswarar temple is a purpose connected with the temple, though the service is not done in the temple and therefore the endowment is a religious endowment attracting the provisions of the said Act. In this case Mandagapadi service is done inside the temple premises while the deity is taken in procession. The performance of Mandagapadi on the second day of Boopathi Thirunal for Lord Ranganathaswami in the month of Thai is a purpose connected with the temple and hence the endowment created for performance of certain services while the deity is taken in procession inside the temple will be service done in the temple. In this case it is not disputed that the performance of Mandagapadi on the Boopathi Thirunal on the second day of Thai is a purpose connected with the temple and that the income from the suit property has to be spent in connection with the said festival.

8. The learned counsel for the respondent, however, draws my attention to a decision of this Court in *Sri Kallalagar Trust* v. *V. Maruthamalai Ambalam*[1]. In that case an endowment was created in connection with the Chitrai Pournami Festival in Kallalagar temple taking place once in every year. Provision was made in the trust deed for construction of a mandapam and a mandagapadi was directed to be performed when the deity is taken from Alagar temple to Madurai Town where the pournami festival is conducted on the sands of the Vaigai river. It was held in that case that the Mandagapadi is not an integral part of the festival of the temple, that it was in no way connected with the festival and that the endowment for the conduct of such worship cannot be a specific endowment and that it should be treated only as a private one. But in that case the Mandagapadi was not performed inside the temple but it was done while the deity was taken in procession from Alagar temple to Madurai Town a private Mandapam constructed by the donor himself. But in the case on hand the Mandagapadi is being performed in a Mandapam belonging to the deity and inside the temple premises. Therefore it should be taken to be a service in the temple.

9. This conclusion of mine is fortified by the fact that every year the temple prepares a *thittam* and calls upon the persons in management of the suit property to meet the expenses as mentioned in the said *thittam*. Exhibits A-18 to A-23 are the *thittams* prepared for some of the years during 1948 to 1960. The said expenditure statements which are given beforehand to the persons in management of the trust refer to the expenses of items such as fire works and the decoration of the Mandapam and *thirumanjanam* of the deity etc. The Mandagapadi is performed when the deity goes in procession in *Hamsa Vahanam*. The furnishing of statements of expenditure beforehand by the Devasthanam indicates that the expenditure is met by the Devasthanam and the trustee who is in charge of the suit property was to reimburse the amount. It has not been shown by the respondent that the performance of Mandagapadi is in the nature of a special pooja performed to the deity by the founder's family. From the recitals in the document and the evidence on record it appears that *Hamsa Vahana* Mandagapadi festival is one of the festivals conducted in the temple every year on the second day of Boopathi Thirunal in

1. (1959) 72 L.W. 646.

the month of Thai and the family of the founder had undertaken to meet the cost of performing the said Mandagapadi festival once in three years. In this view of the matter it has to be taken that the Mandagapadi festival for which the property has been endowed by the family of the respondent is a religious service rendered in the temple. This will clear attract the definition of "specific endowment". "Specific endowment" has been defined in section 6 (19) as follows:

> "Specific endowment means any property or money endowed for the performance of any specific service or charity in a math or temple, or for the performance of any other religious charity, but does not include an inam of the nature described in *Explanation* (1) to clause (17). ......".

Admittedly in this case the property had been endowed for the performance of a service in a temple and the endowment is not of any specified income from a property or any specified amount but the property itself. Once it is a specific endowment, a scheme can be framed by the Deputy Commissioner, Hindu Religious and Charitable Endowments under section 64 (1) read with the explanation thereto which refers to a specific endowment attached to a temple.

10. The learned counsel for the appellant also contends that in any event in O.A. No. 229 of 1944 the Board of Commissioners for Hindu Religious Endowments, Madras acting under the provisions of Madras Act II of 1927, as amended in 1945, had held that the trust is a specific endowment and therefore the Board had jurisdiction to frame a scheme in relation thereto and that the said decision not having been challenged by filing a suit, the same should be taken to have become final and that the said decision will bar the present suit. In O.S. No. 229 of 1944 an application was made for framing of a scheme of administration for this endowment. The said application for framing a scheme was resisted by the person in possession of the endowment on the ground that the trust created by Sesha Iyengar was a private trust not coming within the scope of Madras Act II of 1927, and, therefore, an application for framing a scheme under section 57 of that Act is not competent as the temple to which the Kattalai is attached is a notified temple. Dealing with this objection the Board of Commissioners expressed:

> "Exhibit A is the partition deed by which the endowment was created by Sesha Iyengar in 1890. The recitals therein are quite clear; they make an absolute dedication of the properties mentioned in schedule 10 to the kattalai in question. It is also expressly stated therein that that the family do not have any rights to the property. The object of the endowment is the performance of festivals in temple to which the provisions of the Madras Hindu Religious Endowments Act apply. The said temple is a public temple. The festival is one in which all members of the public are interested. It is therefore futile to contend that the endowment is a private trust and that the Act does not apply. It may here be mentioned that the first respondent has in his deposition before the Assistant Commissioner, Hindu Religious Endowment, Trichy admitted fairly well that after meeting the expenses of the kattalai, the surplus cannot be appropriated for private use".

From the above extract it will be clear that the Board of Commissioners proceeded on the basis that this is a kattalai attached to the temple and therefore it is a specific endowment. This order has not been challenged by any of the descendants of Sesha Iyengar. The learned counsel for the respondent would say that since ultimately no scheme was framed the decision was not challenged by filing a suit. It is true, no scheme was settled in those proceedings as the person in management of the trust agreed to carry out the directions of the Board in the matter of management of the properties. That will not, however, mean that the decision rendered by the Board that the suit property is a kattalai attached to a temple has become inoperative. So long as that decision remains unchallenged, that will constitute a bar for the present suit. Though that was a decision rendered by the Board of Commissioners in proceedings for the framing of a scheme, it should be taken to be a decision under section 84 (1) as amended in 1945 as that is only the provision under which the Board is empowered to decide a dispute as to whe-

ther a particular institution is a specific endowment or not. Sub-section (2) of section 84 of Act II of 1927 says that a trustee affected by a decision under sub-section (1) may within one year apply to the Court to modify or set aside such decision and subject to the result of such application, the order of the Board shall be final. In this case, even though a decision has been rendered by the Board that the suit trust is a specific endowment, the persons affected by that decision have not chosen to take steps to modify or set aside that order. Thus the order passed by the Board has become final. The respondent, therefore, cannot how in these proceedings challenge the jurisdiction of the Hindu Religious and Charitable Endowments Board to initiate proceedings for the framing of a scheme in view of section 108 of Act XXII of 1959, which says that no suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of Law, except under, and in conformity with, the provisions of this Act. Definition of religious institution includes a specific endowment and the present suit is not a suit filed in conformity with the provisions of the Act which provides for filing of a suit only in cases coming under section 70 of the Act. The present suit has not been filed under section 70. Hence the suit should be taken to be barred by section 108.

11. In this view, the judgment of the lower Appellate Court is set aside and the second appeal is allowed. The suit O.S. No. 68 of 1969 will stand dismissed. There will, however, be no order as to costs.

R.S. ——— *Second appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*A. Varadarajan, J.*

M/s. The Balusserry Benefit Chit Fund (P.) Ltd., by the Manager, No. 3, Singarachari Street, Triplicane, Madras-5

.. *Petitioners**

v.

S. Sreenivasan *alias* S. S. Vasan and another

.. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33-C (2)—Suspension of employee—Claim petition for wages filed by employee before Labour Court—Claim allowed—Subsequent domestic enquiry and removal from service of the employee—No nullification of the order of Labour Court—Order of Labour Court challengeable only in separate proceedings.

The first respondent-employee was placed under suspension by the petitioner-employer with effect from 29th April, 1974. The first respondent filed a claim petition on 6th June, 1975 before the Labour Court under section 33-C (2) of the Industrial Disputes Act claiming salary and bonus. The Labour Court allowed the claim petition by an order dated 10th June, 1976. Subsequent to this, a domestic enquiry was conducted by the petitioner and the first respondent was dismissed from service with retrospective effect from 29th April, 1974 by an order dated 5th April, 1977. The petitioner filed a writ petition, and claimed that the order of dismissal dated 5th April, 1977 was with retrospective effect from 29th April, 1974 and, therefore, the first respondent was not entitled to claim the benefit, which had been computed in the claim petition by the Labour Court.

Held: The dismissal order which had come into existence after the date of the order in the claim petition could not be allowed to have the effect of effacing the order passed validly by the Labour Court. The Order

* W. P. No. 2980 of 1976. 27th *April*, 1979.

passed by the Labour Court validly under section 33-C (2) of the Act could be got rid of only by challenging the same in proceedings taken under Article 226 of the Constitution of India or by any petition for review or other process known to law.

[*Para.* 9.]

Cases referred to:—

Secretary, Multi-purpose Co-operative Society, Malayadi Vanniyur P. O. v. *Presiding Officer, Labour Court,* (1979) 1 Lab.L.J. 29; *Secretary, Palani Co-operative Sales Society, Palani* v. *The Presiding Officer, Labour Court,* (1975) 88 L. W. 191: 47 F.J.R. 128: A.I.R. 1975 Mad. 241.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records on the file of the 2nd Respondent relating to C.P. No. 290 of 1975 and quash he order of the Second Respondent, dated 10th June, 1976, made therein.

A. L. Somayaji, for Petitioner.

J. Kanagaraj of *Raj* and *Raj,* for Respondent.

The Court made the following

ORDER.—This writ petition is under Article 226 of the Constitution of India for the issue of a writ of *certiorari* or any other appropriate writ or order calling for records of the second respondent, *viz.,* the Presiding Officer, Additional Labour Court, Madras, relating to Claim Petition No. 290 of 1978 and quashing the order, dated 10th June, 1976 passed in that petition computing the benefits claimed by the first respondent under section 33-C (2) of the Industrial Disputes Act, 1947.

2. The first respondent was working as a Clerk under the petitioner on a salary of Rs. 300 per mensum. According to the petitioner, there was an internal audit and it disclosed that the first respondent had misappropriated monies to the extent of Rs. 9,160.50 by making false entries and preparing false vouchers. According to the petitioner, when confronted with the internal audit report, the first respondent stayed away from work from 25th April, 1974. Thereupon, the petitioner called upon the first respondent by Exhibit P-3, dated 29th April, 1974 to explain as to why he stayed away from work. On 9th May, 1974 the first respondent sent a reply, Exhibit P-5, saying that on 25th April, 1974 he took ill suddenly and requesting for extension of leave till 11th May, 1974. Nothing was heard from the first respondent thereafter. The petitioner asked the first respondent by the letter, Exhibit P-6, dated 24th May, 1974 to submit his explanation. The first respondent sent the explanation, Exhibit P-7, dated 3rd June, 1974. On 10th September, 1974 the first respondent sent a lawyer's notice, Exhibit P-8, claiming subsistence allowance on the ground that he had been suspended from service. The petitioner sent a reply, Exhibit P-9, dated 16th October, 1974 saying that there was no suspension and that the first respondent himself stayed away from work and was not entitled to any subsistence allowance. On 6th June, 1975, the first respondent filed Claim Petition No. 290 of 1975 under section 33-C (2) of the Industrial Disputes Act claiming salary for May, 1974, and subsistence allowance for the subsequent period at 50% of the wage and bonus at 20% of the wages, aggregating to Rs. 2,970. Subsequently the first respondent filed I.A. No. 24 of 1976 for amendment of the Claim Petition No. 290 of 1975 by claiming full wages for the period subsequent to May, 1974, instead of subsistence allowance.

3. The petitioner filed a counter-affidavit in the claim petition denying that there was any suspension of the first respondent and contending that the petitioner had stayed away from work and was not entitled to any subsistence allowance or any other amount. He filed a counter-affidavit opposing I.A. No. 24 of 1976 saying *inter alia* that it is not maintainable.

4. The Labour Court allowed the interlocutory application and treated the claim petition as one claiming full wages from May, 1974 and bonus at 20% of the wages. Subsequently the Labour Court allowed the claim petition as prayed for by any order,

dated 10th June, 1976 holding that there was suspension and that there was no provision for suspension and, therefore, the first respondent was entitled to full wages for the entire period as well as bonus.

5. It is stated that there was a criminal case against the first respondent. Subsequently the first respondent was found guilty of the charge framed against him in domestic enquiry and he was dismissed from service with retrospective effect from 29th April, 1974 by an order, dated 5th April, 1977. The petitioner thus contends that the impugned order, dated 10th June, 1976 of the Labour Court is liable to be quashed.

6. In the writ petition, the first respondent contends that he had been suspended from service and that since there is no standing order or any contract between the parties providing for the petitioner to suspend the first respondent, the first respondent is entitled to full wages and the bonus claimed in the claim petition.

7. The only argument advanced by the learned counsel for the petitioner is that the order of dismissal dated 5th January, 1977 is with retrospective effect from 29th April, 1974 and, therefore, the first respondent has to be held to be not entitled to claim the benefit, which has been computed in the claim petition by the Labour Court by order, dated 10th June, 1976. In support of this contention, reliance is placed by the learned counsel for the petitioner on the decision of a Division Bench of this Court in the *Secretary, Multi-purpose Co-operative Society, Malayadi Vanniyur P. O., Kanyakumari District* v. *Presiding Officer, Labour Court, Madurai and another*[1], and also on the decision of a Full Bench of this Court in the *Secretary, Palani Co-operative Sales Society, Palani and another* v. *The Presiding Officer, Labour Court, Madurai and another*[2]. In the Full Bench case there was a claim petition for computing the benefit claimed by a workman and subsequently there was an order of dismissal. The learned Judges, while remanding the matter for fresh disposal by the Presiding Officer, Labour Court, had observed that the Presiding Officer would also take into account the subsequent dismissal of the employee concerned on the question whether in view of it his claim would be tenable and if so, to what extent. In the Division Bench case V. Ramaswami and S. Ratnavel Pandian, JJ., have observed that it has been held in a number of decisions by the Supreme Court that when a suspension pending enquiry is followed by a dismissal or termination of service in pursuance of an order made in the enquiry, the suspension order merges with the order of dismissal. It has also been held that if an employee was suspended pending an enquiry, the order of dismissal could be given retrospective effect from the date of suspension but not otherwise. In the other portion of the judgment the learned Judges have observed as follows:—

> "Normally if there is an enquiry pending and the suspension is pending such an enquiry, the employee concerned may not be in a position to invoke the jurisdiction of the Labour Court under section 33-C (2) as he will have to await the decision in the enquiry. Even if the enquiry is delayed his only remedy would be to file a petition for *mandamus* to direct the completion of the enquiry at an early date and cannot invoke jurisdiction under section 33-C (2) but when no enquiry is pending and the employee is kept in suspension indefinitely, certainly he will be entitled to invoke the provisions of section 33-C (2) for determination of the amount payable to him for the period of suspension".

Having regard to the facts and circumstance of that case that there was no enquiry at all till the date when the application was filed, for more than one year from the date of suspension, the learned Judges held that the application before the Labour Court was maintainable and the Labour Court was right in going into the question as part of the enquiry, for determination of the amount payable and the legality of the suspension itself.

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1. (1979) 1 L.L.J. 29.
2. (1975) 88 L.W. 191: 47 F.J.R. 128: A.I.R. 1975 Mad. 241.

8. In the present case only the employee's explanation was asked for by the petitioner's letter, dated 24th May, 1974 and no charge memo. at all was issued to the first respondent, who had been suspended by the letter, Exhibit P-3, until the Labour Court passed the impugned order in the claim petition. The petitioner had confirmed by the subsequent letter Exhibit P-6 the fact that the first respondent had been suspended. The Labour Court was, therefore, justified in inferring from Exhibits P-3 and P-6 that the petitioner had placed the first respondent under suspension with effect from 29th April, 1974. It is seen from the records produced by the learned counsel for the petitioner for my perusal that a charge memo. was issued to the first respondent for the first time only on 11th September, 1976 and that in the enquiry held in respect of that charge, the first respondent had been found guilty and dismissed on 5th January, 1976 retrospectively from the date of the suspension. It is curious to note that the petitioner who had all along been denying the very factum of suspension, has woken up and found after the order in the claim petition had been passed that there had been a suspension and come forward with a case in the order of dismissal that there was a suspension and has dismissed the first respondent with retrospective effect from the date of suspension. Since no charge memo. was issued until 11th September, 1976, though the first respondent has been suspended on 29th April, 1974 itself for nearly 2½ years, the observation made by the learned Judge of the Division Bench in the *Secretary, Multi-purpose Co-operative Society, Malayadi Vanniyur P.O., Kanyakumari District* v. *Presiding Officer, Labour Court, Madurai and others*[1], that when no enquiry is pending and the employee is kept in suspension indefinitely certainly he will be entitled to invoke the provisions of section 33-C (2) for determination of the amount payable to him for the period of suspension would apply to the facts of this case. Therefore, the petition under section 33-C (2) of the Industrial Disputes Act was clearly maintainable before the Labour Court.

9. Now, going to the decision of the Full Bench, it is seen that in the present case the domestic enquiry was started only on 11th September, 1976 by the issue of the charge memo. nearly 3 months after the order in the claim petition granting the benefits due to the first respondent under section 33-C (2) of the Industrial Disputes Act had been passed. The dismissal order which has come into existence after the date of the order in the claim petition could not be allowed to have the effect of effacing the order passed validly by the Labour Court under section 33-C (2) of the Industrial Disputes Act. It is not possible to agree with the learned counsel for the petitioner that the order could not be construed as taking away the right of the management to dismiss the worker with effect from the date of suspension on his being found guilty of the charge framed against him if he had already been suspended pending enquiry into the charge. If the claim is made for the subsequent period, the order of dismissal may be a bar and it has to be got over before the claim could be made. That is not the case here. I am of the opinion that the order passed by the lower Court validly under section 33-C (2) of the Industrial Disputes Act could be got over only by challenging the same in proceedings taken under Article 226 of the Constitution of India or by any petition for review or other process known to law. In the circumstances of the case it could not be held that the impugned order has ceased to exist by reason of the dismissal of the first respondent with retrospective effect from the date of suspension on the basis of the order, dated 5th November, 1976 in which he had been found guilty of the charge framed against him only on 11th September, 1976.

10. No other submission was made by the learned counsel for the petitioner in this case. There is no reason to interfere with the impugned order of the Labour Court for the reasons mentioned above. The writ petition is dismissed with costs. Advocate's fee Rs. 100.

S.J. ——— *Petition dismissed.*

1. (1979) 1 L.L.J. 29.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT.—*G. Ramanujam and R. Sengottuvelan, JJ.*

K. Chidambaram and another .. *Appellants**

v.

The Government of Tamil Nadu, represented by its Secretary to Government Commercial Taxes and Religious Endowments Department, Fort St. George, Madras and others .. *Respondents.*

Hindu Religious and Charitable Endowments Subordinate Service Rules, rules 2 (b) *and* 35 (a)—*Government Order fixing* inter se *seniority between direct recruits and promotees—Special rule* 2 (b) *fixing* inter se *seniority, whether contravenes the general rules.*

The appellants were temporaily promoted along with 13 others as Executive Officers, Grade I from the post of Executive Officer, Grade II and they were later regularised. Subsequently a selection of direct recruits to the posts of Executive Officer, Grade I was made and those direct recruits were posted as Executive Officers, Grade I. Therefore there was a fixing of *inter se* seniority as between the appellants who were promoted from Grade II and those who were recruited as Executive Officers, Grade I, in G.O.Ms.No. 57, Commercial Taxes and Religious Endowments Department. In the said combined seniority list, the first appellant was given 15th rank and the second appellant 19th rank. A writ petition was filed on the ground that the *inter se* seniority has been fixed in contravention of rule 35 (*a*) of the State Subordinate Service Rules.

Held: As per general rule 35 (*a*) the senicrity of a person is determined only by the ranking obtained by him in the approved list drawn by the appointing authorities irrespective of the date of commencement of probation. Special Rule 2 (*b*) provides a ratio of 2 : 3 between direct recruits and promotees in the matter of recruitment to posts of Executive Officers, Grade I. Admittedly rule 2 (*b*) is a rule framed under Article 309 of the Constitution and that rule has to be strictly followed in the matter of recruitment to the posts of Executive Officers, Grade I. The fact that in earlier years the Government had not strictly enforced the said rule even if true, is not a ground to say that the Government cannot enforce that rule. Even if the Government had not enforced the rule for certain reasons in the earlier years that cannot be taken advantage of to say that the said statutory rule cannot be given effect to at all. [*Para* 5.]

The general rule 35 (*a*) does not specifically provide for determination of the *inter se* seniority between persons appointed to a category from different sources and it normally applies to a situation where recruitment is made from a single source. In cases where recruitment is made to a service from different sources as in this case, one by direct recruitment and the other by promotion, Special Rule 2 (*b*) determines as to in what proportion the selection should be made from each source. The ratio of 2 : 3 between direct recruits and promotees fixed under the rule has to be strictly followed, provided the Government may for special reasons alter the proportion specified in a particular situation. [*Para.* 6].

In this case some of the promotees had been posted as Executive Officers temporarily, earlier to some of the direct recruits. But such temporary appointments cannot confer on them any right and it is the regular appointment that has to be taken into account for fixing the seniority. The impugned combined seniority list has been fixed by the Government with reference to the quota rule taking into account the date of the regular appointment of direct recruits as well as promotees. In this case since the senicrity had been fixed between persons who had been regularly appointed to the posts in 1965 from two sources, direct recruits and promotees, strictly in accordance with rule 2 (*b*) of the Special Rules, the impugned order has to be held to be valid. [*Paras*. 11 and 13.]

Cases referred to:—

Mervyn Coutinho v. *Collector of Customs*, (1967) 1 S.C.J. 574 : (1966) 3 S.C.R. 600 : A.I.R. 1967 S.C. 52; *V.B. Badami* v. *State of Mysore*, (1976) 2 S.C.C. 906; *N. K. Chauhan* v. *State of Gujarat*, (1977) 1 S.C.C. 308 : (1977) 1 S.C.R. 1037: A.I.R. 1977 S.C. 251; *General Manager, South Central Railway* v. *A. V. R. Siddhanti*, (1974) 4 S.C.C. 335: (1974) 3 S.C. R. 207: (1974) 4 S.C.C. 335: 1974 S.C. 1755.

* W.A.No. 254 of 1976. 16*th April*, 1979.

P. C. Sethi v. *Union of India*, (1975) 3 S.C.R. 207: (1975) 4 S.C.C. 67: (1975) 1 Lab. L.J. 520: A.I.R. 1975 S.C. 2164.

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Mohan dated 27th July, 1976, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 665 of 1976 presented under Article 226 of the Constitution of India to issue a writ of *certiorari*, calling for the records relating to the Government Order G.O. Ms. No. 57, Commercial Taxes and Religious Endowments Department, dated 20th January, 1976, on the file of the 1st respondent and quash the same in so far as it affects the petitioner herein.

S. Chellaswamy, for Appellants.

Advocate-General, *K. Parasaran*, for *D. Raju*, *M. Venkatachalapathy*, *K. Kumaraswami Pillai*, counsel for *K. S. Bakthavatsalam* and *T. S. Srinivasan*, for Respondents.

The Judgment of the Court was delivered by

*Ramanujam, J.**—This appeal is directed against the order of Mohan, J., in Writ Petition No. 665 of 1976 dismissing the said writ petition. The appellants were temporarily promoted along with 13 others as Executive Officer, Grade I from the post of Executive Officer, Grade II on various dates in 1964 and they were later regularised with effect from 1st April, 1965. On 22nd May, 1965, there was a selection of direct recruits to the post of Executive Officer, Grade I and those direct recruits were posted as Executive Officers, Grade I, on various dates in 1965. Subsequently there was fixation of *inter se* seniority of persons as between the appellants who were promoted from Grade II and those who were recruited directly as Executive Officer, Grade I, in G. O.Ms. No. 57, Commercial Taxes and Religious Endowments Department dated 20th January, 1976. In the said combined seniority list, the first appellant has been given 15th rank and the second appellant 19th rank. The appellants had filed the above writ petition seeking to quash the said G. O. on the ground that the *inter se* seniority has been fixed in contravention of rule 35 (*a*) of the State Subordinate Service Rules, hereinafter referred to as the General Rules. Apart from the appellants there were three other promotees who also filed writ petitions challenging the same G.O.

*13th March, 1979.

2. All these writ petitions were resisted by the first and second respondents and the direct recruits who are respondents 3 to 8 herein. Their case was that the *inter se* seniority has been fixed as against those regularly appointed as Executive Officer in Grade I in the year 1965 by applying rule 2 (*b*) of the Hindu Religious and Charitable Endowments Subordinate Service Rules, hereinafter called the Special Rules, by taking two direct recruits and three promotees for every set of five persons and that such *inter se* fixation of seniority is strictly in accordance with the said Rules.

3. Mohan, J., has held that the *inter se* seniority fixed under the impugned G. O. was strictly in accordance with rule 2 (*b*) of the Special Rules and that it does not contravene rule 35 (*a*) of the General Rules. In that view all the writ petitions were dismissed. The view taken by Mohan, J., has been challenged in this writ appeal.

4. The learned counsel for the appellants has urged three contentions. (1) that the *inter se* seniority fixed under the impugned G. O. as between direct recruits and the promotees is not only quite arbitrary but also contravenes rule 35 (*a*) and that it is also violative of Article 16; (2), that rule 2 (*b*) of the Special Rules does not permit the fixation of such a seniority ignoring general rule 35 (*a*); (3) that the *inter se* seniority list has never been fixed so far with reference to Special rule 2 (*b*) and that the new departure made in enforcing the special rule for the first time, has prejudiced persons like the appellants who are promotees.

5. As per general rule 35 (*a*) the seniority of a person is determined only by the ranking obtained by him in the approved list drawn by the appointing authorities irrespective of the date of commencement of probation. Special Rule 2 (*b*) provides for a ratio of 2 : 3 between direct recruits and promotees in the matter of recruitment to the posts of Executive Officers, Grade I. According to the Appellants, general rule 35 (*a*) alone is to be applied in the matter of fixation of seniority ignoring the ratio fixed in Special Rule 2(*b*), for Special Rule 2(*b*) has not been enforced by the authorities at any point of time anterior to the passing of the impugned G. O. We do not see how the appellants can say that Special Rule 2 (*b*) cannot be enforced by the Government even assuming that the said rule has not been given effect to

earlier. Admittedly this is a rule framed under Article 309 of the Constitution and that rule has to be strictly followed in the matter of recruitment to the posts of Executive Officers, Grade I. The fact that in earlier years the Government has not strictly enforced the said rule even if true, is not a ground to say that the Government cannot enforce that Rule. Even if the Government has not enforced the rule for certain reasons in the earlier years as alleged by the appellants, that cannot be taken advantage of by the appellants to say that the said statutory rule cannot be given effect to at all.

6. It cannot be disputed that general rule 435 (*a*) does not specifically provide for determining the *inter se* seniority between persons appointed to a category from different sources and that it normally applies to a situation where recruitment is made for a single source. In cases where the recruitment is made to a service from different sources as in this case, one by direct recruitment and the other by promotion, Special Rule 2 (*b*) determines as in what proportion the selection should be made from each source. In this case the appellants do not challenge the validity of rule 2 (*b*) fixing the ratio of 2:3 between direct recruits and promotees in the matter of recruitment to the posts of Executive Officers, Grade I. Special Rule 2 (*b*) is extracted below:

> "(*b*) In respect of the appointment to the posts of Executive Officers, First to Fourth Grade, two out of every five vacancies shall be filled in by direct recruitment while the other three shall be filled in by any of the other methods specified in sub-rule (*a*):
>
> Provided that the Government may for special reasons alter the proportion specified in this sub-rule".

The ratio of 2:3 between direct recruits and the promotees fixed under the rule has to be strictly followed, provided the Government may for special reasons alter the proportion specified in a particular situation. It is not the case of the appellants that the said ratio 2:3 has been altered or departed from by the Government at any time during the year 1965 when the recruitment of the appellants and respondents 3 to 8 had taken place. How combined seniority list has to be prepared between persons coming from two different sources in the context of a rule like Special Rule 2 (*b*) has been considered by the Supreme Court in the following cases:

7. In *Mervyn Coutinho* v. *Collector of Customs*[1], their Lordships of the Supreme Court were concerned with a seniority list of Appraisers prepared by the Customs department. The said seniority list had been prepared on the basis of the following circular issued by the Central Board of Revenue:

> "*Inter se* seniority of direct recruits and promotees in the grade of Appraisers should be determined in the order in which the vacancy in that grade is filled by the direct recruit or by a promotee according to the quota fixed for such appointment."

by arranging persons appointed in such a way that one person is put in from the direct recruits and one from the promotees from the department alternatively, as the ratio fixed under the service rules was 50:50 as between the direct recruits and the promotees. Preparation of such a seniority list was challenged as offending the right to equality of opportunity enshrined in Article 16(1) of the Constitution. The Supreme Court, however, did not uphold the challenge but it held that where recruitment to a cadre is from two sources namely direct recruits and promotees and a rotation system of 50:50 is enforced, the seniority is to be fixed by alternatively placing a promotee and a direct recruit in the seniority list and while doing so there is no violation of the principle of equality of opportunity contained in Article 16 and that if any anomaly results from the adoption of such a rotational principle, it is not due to any vice inherent in the rotational sytem but may be due to other circumstances such as non-availability of candidates from the respective sources. The following observations of the Supreme Court appears to be pertinent:

> "Where therefore recruitment to a cadre is from two sources namely direct recruits and promotees and rotational system is in force, seniority has to be fixed as provided in the explanation by alternately fixing a promotee and a direct recruit in the seniority list. We do not see any violation of the principle of equality of opportunity enshrined in Article 16 (1) by following the rational system of fixing seniority in a cadre half of which onsists of direct recuits and the other half of promotees and the rotational system by itself working in this way

1. (1967) 1 S.C.J. 574: (1966) 3 S.C.R. 600: A.I.R. 1967 S.C. 52.

cannot be said to deny equality of opportunity in Government service. The anomalies which have been referred to in the petition arise not on account of there being anything opposed to equality of opportunity in Government service by the use of the rotational system, they arise out of the fortuitous circumstance that in this particular service of Appraisers, for one reason or another, direct recruitmnent has fallen short of the quota fixed for it".

In *V.B. Badami* v. *State of Mysore*[1] the Supreme Court had again dealt with a similar situation. In that case there was a quota rule in the matter of recruitment to the post of Assistant Commissioners Class I (junior scale). This cadre has to be filled up from two sources, direct recruits and promotees in the ratio of 1:2. In some of the years recruitment to the cadre post of Assistant Commissioners, Class I (junior scale) had been made from the promotees in excess of their quota. Later when the recruitment of direct recruits had been made, the *inter se* seniority was fixed by applying the quota rule. That was challenged on the ground that it is violative of rule 2 (c) of the Mysore Government Servants (Seniority) Rules, 1957 which was as follows :

> " Seniority *inter se* of persons appointed on temporary basis will be determined by the dates of their continuous officiation in that grade and where the period of officiation is the same the seniority *inter se* in the lower grade shall prevail."

In that case persons who were promoted to the higher post of officiating therein long before the direct recruits came into the picture have been shown as juniors to the direct recruits who came later. The Supreme Court pointed out that in working out the quota rule the following principles are to be generally followed :

> (1) Where rules prescribe quota between direct recruits and promotees, confirmation or substantive appointment can only be in respect of clear vacancies in the permanent strength of the cadre;
>
> (2) Confirmed persons are senior to those who are officiating;
>
> (3) As between persons appointed in officiating capacity seniority, is to be counted on the length of continuous service.

The Supreme Court pointed out that the quota between the promotees and direct recruits has to be fixed with reference to the permanent strength in the cadre, that so long as the quota rule remains neither promotees nor direct recruits can be allotted to promotional vacancies in excess of their respective quota and that the quota rule cannot be altered according to exigencies of each situation but can be altered only by fresh determination of the quotas under the relevant rule. On the facts of that case the Supreme Court found that the promotees had been appointed in excess of their quota and therefore they had to give place to the direct recruits and go down to vacancies in the subsequent period. In this view the Supreme Court upheld the seniority list fixed in pursuance of the rotational principle contained in the Service Rules.

8. In *N.K. Chauhan* v. *State of Gujarat*,[1] the Supreme Court has reviewed almost all of its earlier decisions on the point. In the erstwhile State of Bombay the quota fixed for recruitment to the cadre of Deputy Collectors was 50 : 50 as between direct recruits and promotees. The Gujarat State which was formed on 1st May, 1960 continued the quota system by a circular dated 1st May 1960. However, during 1959-62 no direct recruitment was made and all the vacancies had been filled up by promotion. Afterwards in 1963 and thereafter direct recruits were appointed. The direct recruits later appointed claimed seniority over the promotees who had come into the cadre earlier, on the basis of the quota rule. The Supreme Court dealing with the question as to whether the claim of the direct recruits to go ahead in the gradation list on the basis of the rotation rule expressed the view that though the Gujarat Government in that case adopted the quota system, they have not however provided for a rotational or roster system which should go hand in hand with the quota system, and that in the absence of a rule of rotation a quota is fixed for each category at the stage of the entry, the quota methodology may itself take many forms-vacancy-wise ratio, cadre composition-wise proportion

1. (1976) 2 S.C.C. 906.

1. (1977) 1 S.C.C. 308: (1977) 1 S.C.R. 1037: A.I.R. 1977 S.C. 251.

period-wise or numberwise regulation. If the rotation principle is not provided in the rules which is usually a corollary to the quota rule, it is then open to the Government to adopt any one methodology in fixing the *inter se* seniority. between persons coming from various sources The Supreme Court ultimately expressed its view thus:

"The quota rule does not, inevitably, in voke the application of the rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and those deficient vacancies have been filleed up by fromotees, later direct recruits cannot claim 'deemed' dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits vacancy arose. Seniority will depend on the length of continuous officiatiing service and cannot be upset by later arrivals from the open market save to the extent to which any excess promotees may have to be pushed down as indicated earlier."

The ultimate conclusions of the Supreme Court after a survey of all decided cases on the point are these:

"(*a*) The quota system does not necessitate the adoption of the rotational rule in practical application. Many steps of working out 'quota' prescription can be devised of which rota is certainly one.

(*b*) While laying down a quota when filling up vacancies in a cadre from more than one source, it is open to Government, subject to tests under Article 16, to choose 'a year' or other period or the vacancy by vacancy basis to work out the quota among the sources........

(*c*) Seniority normally, is measured by length of continuous, officiating service the actual is easily accepted as the legal. This does not preclude a different prescription, constitutionality tests being satisfied.

(*d*) A periodisation is needed in this case to settle rightly the relative claim of promotees and direct recruits. 1960-62 forms a period A and 1963 onwards forms period B. Promotees regularly appointed during period A in excess of their quota, for want of direct recruits (reasonably sought but not secured and because tarrying longer would injure the administration) can claim their whole length of service for seniority even against direct recruits who may turn up in succeeding periods.

(*e*) Promotees who have been fitted into vacancies beyond their quota during the period B the year being regarded as the unit, must suffer survival as invalid appointees acquiring new life when vacancies in their quota fall to be filled up. To that extent they will step down, rather be pushed down as against direct recruits who were later but regularly appointed within their quota."

9. The Supreme Court in its earlier decisions proceeds on the basis that if appointments have been made from a particular source in excess of the quota, persons coming from other sources within their quota can claim seniority to the former even if they had been appointed to the post earlier. The view taken by the Supreme Court in the later decision in *N.K. Chauhan* v *State of Gujarat*,[1] is that though there is a quota for each source that has to be applied in conjunction with the rule of rotation if any provided in the rules and that if there is no rule of rotation the quota rule has to be applied either with reference to vacancies at a particular time or cadre composition or a period or the number and that it is open to the Government to choose a year or other periods to work out the quota among the various sources. Applying the said principle we have to find out whether the impugned combined seniority list prepared for the post of Executive Officers, Grade I is invalid as offending Article 16 of the Constitution as contended by the appellants.

10 The learned counsel for the appellant refers to the decision in *General Manager, South Central Railway* v. *A.V.R. Siddhanti*[2] wherein it has been observed that once the persons coming or recruited to the service from two different sources are absorbed into one integrated class with identical service conditions, they cannot be discriminated against with reference to the original source, for the purpose of absorption and seniority. But those observations have to be read with reference to the particlular facts of that case.

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1. (1977) 1 S.C.R. 1037: A.I.R. 1977 S.C. 25 1.
2. (1974) 4 S.C.C. 335: (1974) 3 S.C.R. 207: A.I.R. 1974 S.C. 1755.

There the recruitment was made from three sources to the grain shop department of the Railways and integrated into a single cadre governed by identical service conditions. After some time the grain shop department was wound up and at the stage of absorption of the persons who were working in the grain shop department at the time of the winding up in other permanent departments, classification of grain shop staff was made by fixing the *inter se* seniority. That classification was based on the source from which they came originally to the grain shop department. Such a classification was held to be bad for the reason that after there has been a clear merger of persons coming from three different sources into a single cadre, there is no question of fixing seniority for purposes of absorption in permanent departments with reference to the source from which they came. Further, there was no quota rule as between the three sources from which recruitment was made and therefore the principle laid down in that case cannot be applied here. The learned counsel also refers to the decision in *F C. Sethi* v. *Uni n of India*[1], in support of his proposition that once the recruitment has been made to the post of Executive Officer, Grade I from two different sources, direct recruits as well as promotees, persons recruited have become equal and there could be no discrimination whatsoever amongst the equals and giving of a higher rank to the direct recruits without reference to their date of entry into service will be arbitrary. That decision also will not apply here as it has been found in that case that though there was a quota fixed for direct recruits and promotees, the policy adopted by the Government as seen from the executive instructions are different and that the appointments had been made only on the basis of the executive instructions and not on the basis of quota.

11. In this case both the appellants who are promotees and respondents 3 to 8 who are direct recruits had been appointed regularly in the year 1965. As has been held by the Supreme Court in *N.K. Chauhan* v. *State of Gujarat*[2], it is open to the Government to fix a year as a unit for fixing the quota. Therefore with reference to persons recruited in the year 1965, the seniority has been fixed by placing two direct recruits and three promotees in a cycle of five. Once an year could be taken as the unit, what the Government has done in this case cannot be challenged at all, as arbitrary or violative of Article 16 of the Constitution, having regard to the quota rule fixing 2:3 as between direct recruits and promotees. In this case some of the promotees had been posted as Executive Officers temporarily earlier to some of the direct recruits, prior to 1965. But such temporary appointments cannot confer on them any right and it is the regular appointment that has to be taken into account for the purpose of fixing the seniority. The impugned combined seniority list has been fixed by the Government with reference to the quota rule taking into account the date of their regular appointment of the direct recruits as well as promotees.

12. This Court with reference to recruitment to the post of Assistant Commissioners and the fixation of *inter se* seniority with reference to the proportion 60:40 between promotees and the direct recruits held that the quota rule can be applied vacancy-wise. In that case (*F.M. Muthuvel* v. *State of Tamil Nadu and others*[1] in every cycle of 10 vacancies the quota of 60 40 had been applied and that was upheld by this Court. The said view has also been upheld in *F. M. Muthuvel* v. *State of Tamil Nadu and others*[2], by a Division Bench of this Court. In *R. Tamilmani* v. *State of Tamil Nadu and others*[3], the identical question which arises in this case as to the relevant scope of rule 35 (*a*) and the special rule 2 (*c*) of Commercial Taxes Service Rules came up for consideration and one of us expressed the view that an year can be taken as a unit for fixing the *inter se* seniority on the basis of the quota rule and that all those persons recruited to the post of Joint Commercial Tax Officers either by direct recruitment or by promotion in the same year have to be arranged in the seniority list on the basis of the quota rule. The said decision is in consonance with the judgment of the Supreme Court in *N. K. Chauhan* v. *State of Gujarat*[4].

1. (1975) 3 S.C.R. 201 : (1975) 4 S.C.C. 67 : (1975) 1 Lab.L.J. 520 : A.I.R. 1975 S.C. 2164.
2. (1977) 1 S.C.R. 1037 : A.I.R. 1977 S.C. 251.

1. W.P. No. 3660 of 1977.
2. W.A. No. 406 of 1978.
3. W.P. Nos. 2016 and 2017 of 1972.
4. (1977) 1 S.C.R. 1037 : A.I.R. 1977 S.C. 251.

13. In this case, since the seniority had been fixed between persons who have been regularly appointed to the post in the year 1965 from two sources, direct recruits and promotees strictly in accordance with rule 2 (*b*) of the special rules, the impugned order has to be held to be valid.

14. The writ appeal therefore fails and is dismissed. There will however, be no order as to costs.

The Order of the Court was delivered by

Ramanujam, J.—This matter has been posted before us at the instance of the counsel for the respondents 3 and 4, who apprehend that the rights of the respondents 3 and 4 arising out of their regularisation of services as Executive Officer, Grade I from 1962 may be affected by the observations made in our judgment that the respondents 3 and 4 have been recruited directly in the year 1965. We, with a view to avoid any such apprehension, make it clear that any observation made in our judgment will not prejudice the rights, if any of the respondents 3 and 4, whose services have been regularised by orders of Government with effect from 1962. No further orders are necessary.

R. S. ——— *Writ appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

Govindasami Padayachi and others .. *Appellants**

v.

Kalyanasundaram .. *Respondents.*

Tamil Nadu Cultivating Tenants, Arrears of Rent (Relief) Act (XXI of 1972), section 3—Scope and applicability—Lease deed permitting raising of punja crops—Lessee raising sugarcane crops without knowledge of landlord—Lease deed not providing for any penalty or liquidated damages for breach of covenants—Suit for damage for unauthorised use—Whether can be construed as a suit for 'rent' within the Act.

The word 'rent' has no doubt been defined under the Tamil Nadu Cultivating Tenants' Arrears of Rent (Relief) Act. But it cannot be said that the word 'rent' had always to be understood in its wider sense, whenever there is no definition. The meaning of the word 'rent' has to be gathered from the object of the Act and with reference to the provisions thereof. The preamble to the Act says that whereas due to default in the payment of arrears of rent landlords have taken action against cultivating tenants for eviction and for recovery of arrears of rents it is necessary in public interest to give relief to cultivating tenants from the burden of discharging arrears of rent, on condition of payment of current rent to landlords. Section 3 speaks of all arrears of rent payable by a cultivating tenant to the landlord. This seems to suggest that the word 'rent' has been used to mean either agreed rent or any rent fixed as fair rent under the Cultivating Tenants (Fixation of Fair Rent) Act. This cannot contemplate payment by a tenant for misuse of the land or for a different user than the one authorised by the lease agreement, which payment will arise only on certain contingencies arising out of the conduct of the tenant. Therefore 'rent' should be taken to have been used in a restricted sense of payment made by tenant for the occupation of the land either on the basis of the lease agreement or on the basis of the fixation of fair rent by the Rent Court, and it will not cover damages paid by the tenant or unauthorised user of the land

[*Para.* 11.]

*S.A.No. 1991 of 1975. *24th November, 1978.*

In this case, the lease deed did not provide for any penalty or liquidated damages for the tenant's breach of the covenants of the lease. It merely contains a prohibition that the lands should not be used except for raising punja crops. It cannot be therefore construed that the amount payable by way of damages is penal rent. [*Para.* 13].

Rent is usually the compensation paid by the tenant to the landlord for the exclusive possession of a demised premises. The modern conception of rent is that it is a payment which the tenant is bound by his contract to make to his landlord for the use of the property. Rent need not necessarily represent the annual produce of the land. Any payment, to be taken as rent, must be certain or can be ascertained with certainty. Therefore a payment which would arise on the happening of an uncertain event such as the tenant's breach of the lease agreement, cannot be taken to be certain. Therefore the amount which the tenant is made to pay for his breach of the covenant in the lease cannot be taken as rent, for the payment depends upon the actual damages suffered. If payment for damages is treated as rent, it should not have any relation to the damage suffered by the landlord as a result of the breach. Then alone it will became a penal rent. In these circumstances the suit for damages in this case cannot be taken to be a suit for rent. [*Para.* 14.]

Cases referred to :—

State of Punjab v. *British India Corporation*, (1964) 2 S.C.R. 114 : (1964) 1 S.C.J. 571 : A.I.R. 1963 S.C. 1459; *Ramamurthy Subudhi* v. *Gopinath*, (1968) 2 S.C.J. 528 : (1968) 2 S.C.R. 559 : A.I.R. 1968 S.C. 919 : *Madras Piecegoods Merchants Charitable Trust* v. *Moolchand Gupta*, (1966) 2 M L J. 533.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in Appeal Suit No. 160 of 1973 preferred against the decree of the Court of the District Munsif, of Valangiman at Kumbakonam in Original Suit No. 388 of 1970.

K. V. Sankaran and *K. Yamunan*, for Appellant.

N. Venkataraman and *V. K. Shanmugham*, for Respondent.

The Court delivered the following

JUDGMENT.—The defendants in O.S. No. 388 of 1970 on the file of the District Munsif, Valangiman, who failed in both the Courts below, are the appellants. The respondent herein filed the said suit for recovery of a sum of Rs. 3000 as damages from the defendants who are his lessees on the ground that the lease deeds prohibit them from raising any crop other than paddy but that they had raised, contary to the terms of the lease deeds, sugarcane in the suit property in the year 1969 and cut and carried away the sugarcane crop without giving the lessor's share. According to the plaintiff on account of the sugarcane cultivation, the utility of the soil has been much impaired and the defendants have enriched themselves unlawfully by raising sugarcane crops in the lands contrary to the terms of the leased deeds. The plaintiff therefore claimed damages at the rate of Rs. 1000 per year for three faslis from 1377 to 1379.

2. The substantial defence to the suit was that there was no prohibition in the lease deeds for raising sugarcane crops in the leasehold lands, that the sugarcane crop was raised with the knowledge, acquiescence and consent of the plaintiff, that by raising sugarcane crop, the fertility of the soil had not been impaired and that in any event, the plaintiff is entitled to collect only the rent agreed under the lease deeds.

3. While the said suit was pending, Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act XXI of 1972 came to be passed. Section 3 of that Act provided that if the rent due for Fasli 1381 is paid, all the earlier arrears of rent prior to that fasli year will stand wiped out. Such a benefit can be claimed even in respect of a suit or proceeding pending on the date of publication of that Act for recovery of arrears of rent or for eviction of the tenant under section 3 (2). Taking advantage of the provisions of the said Act, the defendants filed an additional written statement stating that they had paid rent lawfully due by them for fasli 1381 before the competent authority under that Act in P. No. 2357 of 1971, that by reason of that payment all the prior arrears had been wiped off, that the plaintiff's suit which is in effect a suit to recover arrears of rent was not maintainable, and that they are not liable to pay any rent or damages which are due prior to fasli 1381 by virtue of the provisions of that Act. The plaintiff filed a reply statement stating that the suit which is one for damages cannot be treated as a suit for recovery of rent and that therefore the provisions of Tamil Nadu

Act XXI of 1972 have no application to the facts of the case.

4. On the above pleadings, the parties went to trial and adduced evidence in support of their respective contentions. The trial Court held that the lease deed. Exhibits B-4, B-5 and B-6 under which the defendants are cultivating the lands permit the lessee to raise only punja crops in the land, that sugarcane crop is not punja crop and that the defendants have raised sugarcane crop in the leasehold lands contrary to the terms of the lease deeds. It also found that the raising of sugarcane crop by the defendants was without the knowledge and consent of the lessor, the plaintiff, and that, therefore the defendants had incurred a liability to pay damages for unauthorised user of the property by raising sugarcane crop, at the rate of Rs. 1,000 per year claimed by the plaintiff on the basis of the admission contained in Exhibit A. 9, a notice issued by the defendants that the value of the sugarcane crop was Rs. 6,000. On the question as to whether the defendants are entitled to the benefit of section 3 of Tamil Nadu Act XXI of 1972 the trial Court took the view that the suit being one for damages the defendants are not entitled to invoke the provisions of the said Act which will apply only to suits for arrears of rent or proceedings for eviction on the ground of non-payment of rent. In this view, the trial Court decreed the plaintiff's suit as prayed for. On appeal, the lower appellate Court substantially had agreed with the findings given by the trial Court and affirmed except for the variation in the amount, the judgment and decree of the trial Court.

5. In this second appeal by the defendants, the findings of the Courts below that as per the terms of the lease deeds the defendants are not entitled to raise sugarcane crops and that therefore they are liable to pay damages to the plaintiff for breach of the terms of the lease deeds have been challenged. But having regard to the terms of the lease deeds and the oral evidence in the case which indicate that raising of sugarcane crop was without the knowledge and consent of the lessor and that the same was contrary to the terms of the lease deeds, those concurrent findings cannot successfully be challenged. The quantum of damages fixed by the Courts below has not been seriously challenged having regard to the fact that the defendants themselves have estimated the value of sugarcane crop at Rs. 6,000 in Exhibit A-9. Therefore the quantum of damages fixed by the Courts below cannot also be said to be unreasonable. Thus the only question that remains to be considered is as to whether the appellants are entitled to claim the benefits of Tamil Nadu Act XXI of 1972.

6. Admittedly the provisions of the said Act can be invoked only in respect of suits or proceedings for recovery of arrears of rent or for eviction for non-payment of arrears of rent. Mr. Sankaran, the learned counsel for the appellants submits that though the suit purports to be one for recovery of damages, it is in substance a suit for rent, that what is sought to be recovered in the suit is the compensation due to the landlord for the cultivation of sugarcane crops by the defendants, and that the damages fixed by the Courts below being a share of the crops raised by the defendants it should be taken to be rent. According to the learned counsel the word 'rent' not having been defined in Tamil Nadu Act XXI of 1972 it should be understood in a wider and popular sense and not in restricted sense to mean the actual rent agreed between the parties, and if construed in that light, the amount sought to be recovered in the suit is only in the nature of penal rent for the raising of sugarcane crop in the lease-hold land.

7. The learned counsel for the respondent however submits that the amount sought to be recovered from the defendants in the suit is to compensate the landlord in respect of an unauthorised set on the part of the defendants in raising a crop contrary to the terms of the lease deeds, that such a claim is one for damages for breach of lease agreement and that though the damages have been calculated with reference to the yield of the sugarcane, the suit cannot be said to be one for rent. The learned counsel, in support of his submission, refers to the decision of Suryamurthy, J., in *Ramaswamy Udayar* v. *Ponniah Pillai*[1] wherein the learned Judge has held on identical facts that the defendants are not entitled to claim the benefit of section 3 of Tamil Nadu Act XXI of 1972. That was also a case for recovery of damages for raising sugarcane crops without the consent of the lessor and the defendants sought the benefit of the provision of the said Act, on payment of the current

1. (1978) 2 M.L.J. 331 : 91 L.W. 506.

rent. It was held by Suryamurthy, J. that the provisions of section 3 (2) of Tamil Nadu Act XXI of 1972 can be invoked only in a suit or a proceeding pending for the recovery of arrears of rent or for eviction of a cultivating tenant for non-payment of the arrears of rent and not to any suit for recovery of damages for use and occupation or damages for misuse. There is no doubt that the said decision squarely applies to the facts of this case which are the same as in that case.

8. Mr. Sankaran, learned counsel for the appellants would say that no reasons have been given by the learned Judge for reaching the conclusion he did, and that the only reason apparent from the decision that a suit for use and occupation or for misuse of a land will not be a suit for rent cannot legally be sustained. According to him damages for use and occupation is only a penal rent though it is usually called damages and that so long as the jural relationship continues between the tenant and the landlord whatever is paid by the tenant for the user of the land has to be taken as rent. In support of his submission the learned counsel referred to the following decisions. In *State of Punjab v. British India Corporation*[1] it is observed:

> "In its wider sense rent means any payment made for the use of land or buildings and thus includes the payment by a licensee in respect of the use and occupation of any land or building. In its narrower sense it means payment made by tenant to landlord for property demised to him."

In *Ramamurthy Subudhi v. Gopinath*[2]. The Supreme Court, while construing the word 'rent' occurring in a compromise decree in a suit for ejectment held that from the mere use of the word 'rent' it cannot be assumed that a fresh tenancy is created and the word 'rent' can also be used in a wider sense of any payment by a licensee in respect of the use and occupation of the land or building and need not necessarily mean the amount paid by the tenant to landlord for the property demised to him. The learned counsel also refers to the decision in *Madras Piecegoods Merchants Charitable Trust v. Moolchand Gupta*[3] wherein Kunhamed Kutti, J., has observed:

> "Rent" has not been defined in the Act and the use of this word is not conclusive of the matter that relation of landlord and tenant is created between the owner and occupier. In the legal sense, it may be used as recompense paid by the tenant to the landlord for the exclusive possession of the premises occupied by him; it may also be used in the genetic sense without importing the legal significance aforesaid of compensation for the use and occupation. 'Rent' in the legal sense can only be reserved on a demise of immovable property. Hence the use of the term 'rent' cannot preclude the landlord from pleading that there is no relationship of landlord and tenant."

9. Sri Thiruvenkatachari for the respondent emphasised that what is payable by the applicant subsequent to the decree cannot be characterised as 'rent' but has to be construed as mesne profits defined in the Civil Procedure Code, section 2 (12) as 'profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest as such profits'. This circumstance again is not conclusive for the reason that if the applicant by reason of the aforesaid legislation can be deemed to be a statutory tenant, what is payable by him as mesne profits has, for that reason to be also construed as 'rent'.

10. However, I do not see how the observations made in the said decisions will help the petitioners in these cases. In the first case though the word 'rent' in wider sense may mean any payment made for the use of the land or place, that word was found to have been used in the Punjab Urban Immovable Property Rules in a limited sense of a payment made by the tenant to the landlord for property demised to him, even though the word 'rent' has not been defined in the Rules. Such a restricted meaning has been given to the word "rent" having regard to the object of the Rules. In the second case that word 'rent' occurring in a compromise decree has been understood in a wider sense meaning any payment made for the use of the land or building including a payment by a licensee in building. The decision in *Madras Piecegoods Merchants Charitable Trust v. Moolchand Gupta*[1] cannot also help the petitioner as the said decision is based on the fact that there was a statutory tenancy between the landlord and tenant and

1. (1964) 1 S.C.J. 571: (1964) 2 S.C.R. 114: A.I.R. 1963 S.C. 1459.
2. (1968) 2 S.C.J. 528: (1968) 2 S.C.R. 559: A.I.R. 1968 S.C. 919.
3. (1966) 2 M.L.J. 533.

1. (1966) 2 M.L.J. 533.

therefore, whatever is paid by the tenant for use and occupation should be taken to be as one for rent. Apart from the fact that the reasoning in this decision runs counter to the later observations of the Supreme Court in *Ramamurthy Subudhi* v. *Gopinath*[1], the decision itself is based on the fact that the compromise decree between the landlord and tenant cannot affect the statutory tenancy created under the Act.

11. It is true, the word 'rent' has not been defined under the Act. But it cannot be said that the word 'rent' has always to be understood in the wider sense, whenever there is no definition. The meaning of the word 'rent' has to be gathered from the object of the Act and with reference to the provisions thereof. The Act is intended to give relief to cultivating tenants in respect of certain arrears of rent. The preamble to the Act says that whereas due to default in the payment of arrears of rent landlords have taken action against cultivating tenants for eviction and for recovery of arrears of rent it is necessary in public interest to give relief to cultivating tenants from the burden of discharging arrears of rent, on condition of payment of the current rent to landlords. Section 3 speaks of all arrears of rent payable by a cultivating tenant to the landlord. This seems to suggest that the word 'rent' has been used to mean either agreed rent or any rent fixed as fair rent under the Cultivating Tenants (Fixation of Fair Rent) Act. That cannot contemplate payment by the tenant for misuse of the land or for a different user than the one authorised by the lease agreement, which payment will arise only on certain contingencies arising out of the conduct of the tenant. Therefore 'rent' should be taken to have been used in a restricted sense of payment made by a tenant for the occupation of the land either on the basis of the lease agreement or on the basis of the fixation of fair rent by the Rent Court, and it will not cover damages paid by the tenant for unauthorised user of the land.

12. Mr. Sankaran for the petitioners would submit that damages for unauthorised use of the demised property is in the nature of a penal rent and therefore, it should be taken to come within the meaning of the word 'rent'. The learned counsel will be right in his submission if the lease deed itself provides for a penal rent in the case of cultivation of unauthorised crops. But where the lease deed itself contains a prohibition and does not provide for any penal rent, the amount determined as payable by the Court for such an unauthosied user of the property demised cannot be treated as a penal rent. As a matter of fact this aspect is dealt with in paragraph 1201 of Halsbury's Laws of England, third Fedition, Volume 23 under the head "nature of penal rents" as follows:

> "An increased rent may be reserved in case the tenant commits a breach of the covenants of his lease. Such a rent is commonly known as penal rent; in general, however, it is not in the nature of a penalty, but is a liquidated sum or succession of sums payable by way of satisfaction. If the increased rent is made payable as 'rent', and if it has once become payable, it will continue to be payable periodically during the residue of the term, and none the less that the breach of covenant has been ploughed up has been laid down to grass again, unless the terms of the lease as a whole show that the rent is to be payable only while the breach continues. A receipt of the original rent is not a waiver of the landlord's claim to the additional rent".

13. In this case, the lease deed does not provide for any penalty or liquidated damages for the tenant's breach of the convenants of the lease. It merely contains a prohibition that the lands should not be used except for raising punja crops. I cannot, therefore, construe the amount payable by way of damages is penal rent.

14. Rent is usually the compensation paid by the tenant to the landlord for the execlusive possession of a demised premises. The modern conception of rent is a payment which the tenant is bound by his contract to make to his landlord for the use of the property. Rent need not necessarily represent the annual produce of the land. Any payment, to be taken as rent, must be certain or can be ascertained with certainty. Therefore a payment which would arise on the happening of an uncertain event such as the tenant's breach of the lease agreement, cannot be taken to be certain. Therefore the amount which the tenant is made to pay for his breach of the covenant in the lease cannotbe taken as rent, for the payment depends upon the actual, damages suffered. If payment for damages is treated as rent, it should not have any relation to the damage suffered by the landlord as a result of the breach. Then alone it will

1. (1968) 2 S.C.J. 528; A.I.R. 1968 S.C. 919.

become a penal rent. In these circumstances, I am of the view that the suit for damages in this case cannot be taken to be a suit for rent The provisions of the Act will have therefore no application and the petitioner is not entitled to any relief based on section 3 (2) of the Act.

15. In the result, the second appeal fails and is dismissed. No costs.

R.S. —— *Second appeal dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ., A. Varadarajan and V. Sethuraman, JJ.*

Mathuram Augustine .. *Petitioner**

v.

Vijayarani .. *Respondent.*

Indian Divorce Act (IV of 1869)—Suit by husband against wife for declaration of nullity of marriage—Allegation of physical impotency of wife—Refusal by wife to have sexual intercourse with the husband—Commission to examine wife by a doctor—Refusal by the wife to submit for examination—Inference of impotency warranted—Declaration granted.

Matrimony, whether sacramental or contractual, projects certain reciprocal obligations as between the spouses. One of the main objectives of a matrimonial tie is consummation. Consummation of a marriage which is demonstrated by the parties having sexual intercourse with each other, is one of the necessary concomitants of matrimony or matrimonial tie. If due to obduracy or obstinacy or otherwise on the part of either of the spouses the marriage is not consummated and one is not willing to have sexual intercourse with the other, if an opportunity is given after being accused by one of the spouses that the other spouse is physically impotent, if the accused spouse refuses to submit himself or herself to medical examination so as to obtain an expert opinion about his or her physical condition and if the above facts are established in a given case, then, Courts are bound to draw a reasonable inference from such obduracy on the part of the accused spouse not to submit to a medical examination and not have sexual intercourse with the seeking spouse that the accused spouse was physically impotent and the marriage is a nullity.

[*Para.* 7.]

Case referred to:—

Jayaram Anthony v. *Mari Seenu Ammal*, (1969) 2 M.L.J. 194: 82 L.W. 454: A.I.R. 1970 Mad. 103.

Case referred by the District Judge, Tirunelveli in his letter D. No. 3941, dated 20th March, 1978 for confirmation by the High Court under section 17 of the Indian Divorce Act, 1869 of the decree nisi dated 14th February, 1978 and passed in O.S. No. 124 of 1976 on his file.

G. M. Nathan, I. Mahaboob Sheriff and *M. B. Dominique,* for Petitioner.

R. Subramanian, for *amicus curiae*, for Respondent.

The Judgment of the Court was delivered by *Ramaprasada Rao, CJ.*—This reference arises out of the judgment of the learned District Judge of Tirunelveli who decreed the suit for declaring the marriage of the plaintiff with the defendant as null and void under section 18 of the Indian Divorce Act. The short facts are as follows:—The spouses are Christians. The plaintiff married defendant on 27th May, 1976 at the C.M.S. Church at Nazarath, Tiruchendur Taluk and the marriage is evidenced by Exhibit A-1. The plaintiff appeared to have tried his best to have sexual intercourse with the defendant which she refused consistently from the date of marriage. The burden of the song seems to be that in spite of persuasions, ever since the date of marriage, the marriage could not be consummated as the defendant never agreed to have sexual intercourse with him. The plaintiff effected a change of place of residence and took the defendant to Sholinghur and treated her in the expectation that there would be a change in the attitude of the defendant. Even such attempts were of no avail. According to the plaintiff, the defendant has left him to live with her parents to live at Nazarath. The defendant did not appear in the Court below. The plaintiff therefore alleges physical impotency to the

* M.C. No. 18 of 1978. *3rd April,* 1979.

defendant and that she is incapable of having sexual intercourse with him both at the time of the suit and the time of the marriage and prayed for a declaration that the marriage between him and the defendant is null and void.

2. The defendant, the first instance filed a written statement admitting the marriage. She admitted that she refused to have sexual intercourse with the plaintiff during the first night, but would say that it was not due to any impotency on her part but because the overtures made by the plaintiff were violent and as she was tired she refused to have sexual intercourse with him. She denied that she was sexually impotent. She further stated that there were many letters, which passed between her and the plaintiff and that she did not send a reply to the notice sent by the plaintiff before the action. In the end, however, she denied that she is physically impotent. In the actual proceedings, she remained *ex parte*.

3. During the course of trial, an interlocutory application was filed by the plaintiff for a direction from the Court to have the defendant examined medically about her physical condition and for a report whether she was capable of having sexual intercourse. The learned District Judge examined the spouses in Court the defendant, though expressed her willingness for a divorce she was not for an examination of her physical body by medical experts and stated that she was not willing to submit herself to such medical examination by a doctor. Thereafter she did not examine herself.

4. The plaintiff examined himself and secured a letter from the Commissioner, Dr. Maragathavalli, M.D., D.G.O., appointed by the Court for examining the defendant. Dr. Maragathavalli's letter is addressed to the Court. P.W. 1 repeated what he stated in the petition and asserted in the box that the defendant did not have sexual intercourse with him on the nuptial bed and even at places like Tuticorin and Sholinghur to which places he took her for a change she did not have sexual intercourse with him and that for all the reasons as stated by him and for the particular reason that she would not even reply to the notice prior to the action and for the greater reason that she refused to submit herself to medical examination even though an opportunity was given to her by the plaintiff, he asked for a decree as prayed for by him.

5. We may add for the purpose of completion that Dr. Maragathavalli, M.D., D.G.O., who was appointed as Commissioner by the Court wrote to the Court that the defendant did not submit for medical examination on the date fixed for the purpose. It is in those circumstances that the learned District Judge came to the conclusion that the defendant was not willing to submit herself for sexual intercourse with the defendant and a special feature in this case, namely her refusal to submit to a medical examination was an instance to come to the reasonable conclusion that also was physically impotent. He accepted the case of P.W. 1 that from the date of the marriage as between him and the defendant till the date of the action, the marriage was not consummated. In the result he found that the plaintiff was entitled to a declaration that the marriage as between the plaintiff and the defendant is null and void and decreed the suit as prayed for subject however, to confirmation by the High Court as required under law.

6. Learned counsel for the plaintiff supports the judgment and after bringing to our notice the necessary papers in the record seeks for confirmation. The defendant is represented by Mr. S. Balakrishnan, *amicus curiae,* who did not appear yesterday and he is not present in Court today also. We have perused the records and after hearing the arguments of Mr. Raghupathy for the petitioner, we are satisfied that the decree passed by the Court below has to be sustained. Our reasons are as follows:

7. Matrimony, whether sacramental or contractual projects certain reciprocal obligations as between the spouses. One of the main obligations of a matrimonial tie is consummation. Consummation of a marriage which is demonstrated by either party having sexual intercourse with the other, is one of the necessary concomitants of matrimony or a matrimonial tie. If due to obduracy or obstinacy or otherwise on the part of either of the spouses the marriage is not consummated and one is not willing to have sexual intercourse with the other, if an opportunity is given after being accused by one of the spouses that the other spouse is physically impotent, if the

accused spouse refuses to submit himself or herself to medical examination so as to obtain an expert opinion about his or her physical condition and if the above facts are established in a given case, then, Courts are bound to draw a reasonable inference from such obduracy on the part of the accused spouse not to submit to a medical examination and not to have sexual intercourse with the seeking spouse that the marriage is a nullity. P.W. 1, the plaintiff says that he did not have sexual intercourse with the defendant even on the first night and at any time thereafter. Though in the written statement the defendant denied the allegations made by the plaintiff she did not got into the box nor did she challenge the testimony of P.W. 1 in a manner known to law. There is yet another circumstances in this case which throws light upon the fact that physical impotency is apparent in the defendant. The plaintiff, even though the defendant was not physically present in the course of the proceedings, filed an interlocutory application seeking for permission of the Court to have the defendant examined medically about her condition and her capability to have sexual intercourse with him. Dr. Maragathavalli, M.D., D.G.O., was appointed Commissioner. She fixed a date for examination of the defendant. The defendant did not turn up before the Commissioner. She had to report to the Court saying that on the date fixed, the defendant did not turn up for medical examination and the defendant also would say that she was not prepared to submit herself to medical examination and also wrote to the Commissioner to the same effect. These factors undoubtedly establish the contention of the plaintiff that the physical condition of the defendant was such that she was incapable of having sexual intercourse with him and that she was unwilling to have carnal copulation with him.

8. In an earlier Full Bench decision of our Court in *Jayaran Anthony* v. *Mari Seenu Ammal*[1], the learned Judges observed to the same effect as we said earlier and opined as follows:

"In a husband's petition for declaration of a nullity of marriage on the ground of wife's impotency, the wife's consistent refusal to consummate the marriage and also her refusal to submit herself to medical examination are strong circumstances from which a legitimate inference of her impotency at the time of the marriage and also at the time of the institution of the proceedings against her within the meaning of section 19 (1) of the Divorce Act, can be drawn."

9. In that case a reference was made to the passage in the well-known book 'Raydon on Divorce' who stated that where a woman is shown not to have had intercourse with her husband after a reasonable time for consummation of the marriage and it appears that she has refused intercourse and resisted her husband's attempts, the Court, if satisfied that the refusal was not due to more obstinacy or caprice, may draw the inference that it arose from some incapacity proceeding from nervousness or hysteria or from an invincible repugnance to the act of consummation resulting in a paralysis of the will which was consistent only with the incapacity. As we observed in the beginning, one of the necessary concomitants of a marriage is consummation. Obstinacy or obduracy on the part of one of the spouses not to consummate the marriage in the manner stated above in the course of our judgment leads to the reasonable inference that the defendant was physically impotent.

10. We accept the finding of the learned District Judge and the result is that we confirm the decree for a declaration that the marriage between the plaintiff and the defendant is null and void.

R.S. ——— *Decree confirmed.*

1. (1969) 2 M.L.J. 194 : 82 L.W. 454 : A.I.R. 1970 Mad. 103.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Bharat Electronics Limited, having its Registered Office at Jalahalli Post, Bangalore-13 and another .. *Appellants**

v.

M|s. American Export Isbrandsen Lines Inco., by their agents M|s. J. M. Baxi and Company having its office at 2|21, North Beach Road, Madras-1 .. *Respondents.*

Indian Contract Act (IX of 1872), sections 20, 63 and 72—Doctrine of accord and satisfaction—Payment made accepted in full and final settlement — Intention of parties—Mistake of parties regarding claim—Right to revision, when arises.

The plaintiff purchased 20 cartons of Electron tubes from an American Company. The goods were sent under a bill of lading from New York by S.S. "Flying Cloud" belonging to the defendants. The ship arrived at Madras on 22nd September, 1969. When the goods were unloaded nine cartons were found to be in a damaged condition. A survey was conducted on 1st October, 1969, which disclosed that 4 cartons were completely empty. The plaintiff sent a claim bill, dated 19th November, 1969 for a sum of Rs. 20,496 representing the value of goods lost by non-delivery. As there was no response a notice was issued through the recovery agent. The defendants by their letter informed the plaintiff that under clause (17) of the bill-of-lading they were liable to pay only Rs. 3,753.75. A revised bill was made out accordingly and a sum of Rs. 3,753.75 was received. Subsequently the plaintiff found that there was a mistake as the revised bill which had proceeded on the basis that there was only one carton in which all the four tubes were to be found, while actually there were four cartons in which the four tubes were sent. The plaintiff therefore demanded a sum of Rs. 11,261.25. The defendant contended that the sum of Rs. 3,753.75 had been paid in full and final settlement and that therefore, there was no liability to pay the further sum of Rs. 11,261.25. The second plaintiff was the insurer who on payment to the first plaintiff, had been subrogated to the rights of the first plaintiff and therefore both of them filed the suit. [*Paras.* 1, 2.]

Held: The background or intention of the parties has to be examined in order to find out whether there has been an accord and satisfaction. Merely because a cheque drawn on an amount paid in full and final satisfaction has been accepted, it would not follow that there has been an accord and satisfaction so as to disentitle the plaintiff from coming forward with a suit for the proper amount. [*Para.* 13.]

Section 63 of the Contract Act provides that a promisee may dispense with or remit, wholly or in part the performance of the promise made to him or may extend the time for such performance, or may accept, instead any satisfaction which he thinks fit. In order that there may be such dispensing with or remission, wholly or in part of the performance of the contract, there must be a conscious act on the part of the said power. In other words he must realise that he is taking a smaller amount for a larger amount than is due to him. If there is a mistake as to a matter of fact essential to the agreement, which, in this case, is the accord and satisfaction, then the agreement would fall under section 20 of the Act. Similarly, if a party, who is alleged to have dispensed with or remitted a part of performance, was not conscious of the circumstances under which he is accepting a smaller sum, then also it is possible to hold that he has not remitted or dispensed with the performance of the contract. [*Para.* 14.]

Section 72 of the Contract Act provides for recovery of the amount paid by mistake or under coercion. That section cannot apply to the present case, because there is no payment by one to another. This is a case where the amount is sought to be recovered, because the full amount due was not paid. Section 72 cannot apply to a case where there is no over-payment. [*Para.* 15.]

* Appeal No. 830 of 1974. *19th August*, 1978.

Cases referred to:—

Surendra Overseas Ltd. v. *Union of India*, (1974) 2 M.L.J. 146: 87 L.W. 858: A.I.R. 1974 Mad. 297; *M/s. K. P. V. Sheik Mohamed Rowther* v. *Trustees of Port of Madras*, I.L.R. (1975) 1 Mad. 59; *Neuchatel Asphalte Company Ltd.* v. *Barnett*, (1957) 1 W.L.R. 356; *Day* v. *Mclee*, (1889) 32 Q.B.D. 610; *Shyamnagar Tin Factory (P.) Ltd.* v. *Snow White Food Product Company Ltd.*, A.I.R. 1965 Cal. 551; *Union of India* v. *Narayanlal*, A.I.R. 1963 Pat. 152; *Kapoorchand Godha* v. *Mir Nawab Himayatalikhan Azamjah*, (1963) 2 S.C.J. 396: (1963) 2 An.W.R. (S.C.) 94: (1963) 2 M.L.J. (S.C.) 94: (1963) 2 S.C.R. 168: A.I.R. 1963 S.C. 250.

Appeal against the decree of the City Civil Court of Madras in O.S. No. 6187 of 1970.

A. Ramanathan and *N. Baldsubramanian*, for Appellants.

King and *Partridge*, for Respondents.

The Court delivered the following

JUDGMENT:—The short question that arises for consideration is whether the plaintiffs are entitled to recover a sum of Rs. 11,261.25 after having executed a receipt in full settlement for a sum of Rs. 3,723-75 for non-delivery of certain goods shipped through the defendant. The plaintiffs are the appellants. The first plaintiff is Bharat Electronics Limited, Bangalore. It purchased 20 cartons of Electron tubes from an American Company. The goods were sent under a bill of lading from New York by s.s. 'Flying Cloud' belonging to the defendants. The ship arrived at Madras on 22nd September, 1969. When the goods were unloaded, 9 cartons were found to be in a damaged condition. A survey was conducted on 1st October, 1969, which disclosed that 4 cartons were completely empty. Bharat Electronics Limited, sent a claim bill, dated 19th November, 1969 for a sum of Rs. 20,496 representing the value of the goods lost by non-delivery. As there was no response, a notice was sent through the recovery agent for the said sum. By a letter, dated 3rd March, 1970 the defendants informed Bharat Electronics Limited, that under clause 17 of the Bill of Lading they were liable to pay only Rs. 3,753-75. A revised bill was made out accordingly, and a sum of Rs. 3,753-75 was received. Subsequently, Bharat Electronics Limited, found that there was a mistake as the revised bill proceeded on the basis that there was only one carton in which all the four tubes were to be found, while actually there were four cartons in which the four tubes were sent. Bharat Electronics Limited, therefore, demanded a sum of Rs. 11,261-25.

2. The defendants contended that the sum of Rs. 3,753-75 had been paid in full and final settlement and that, therefore, there was no liability to pay the further sum of Rs. 11,261-25. The second plaintiff is the insurer who, on payment of Bharat Electronics Limited, has been subrogated to the rights of Bharat Electronics Limited, and therefore, both of them filed the present suit.

3. The defence was that there was a delay of nine days in the survey and that during this period there was scope for damage or pilferage while the tubes were in the custody of the Port Trust. The Port Trust itself had annotated the goods and only two cartons were found 'empty'; whereas in the survey held subsequently 4 cartons were said to be empty. It was, therefore, contended that there was some pilferage or loss while the goods were in the custody of the Port Trust and that the defendants were not liable. According to the defendants, the amount having been received in full settlement, there was no justification for claiming the further amount under suit and that there was no misrepresentation on its part as alleged in the plaint. The following issues were framed:

..................Issues omitted—*Ed.*

The trial Court held that the defendants are not liable to pay the sum of Rs. 11,261-28, that the amount already paid, *viz.*, Rs. 3,753-75 was not paid by misrepresentation, and that the plaintiffs were estopped from making the suit claim after having accepted the sum of Rs. 3,753-75 in full settlement. The suit was therefore, dismissed. The present appeal has been filed by the unsuccessful plaintiffs.

4. The short question that arises for consideration is whether there was unilateral or bilateral mistake in accepting the sum of

Rs. 3,753-75. The plaintiffs could claim the balance in case it was found that the mistake was as mentioned.

5. On 26th June, 1969, under the Bill of Lading marked as Exhibit A-19, 20 cartons of electron tubes were despatched to the first plaintiff from New York by s.s. 'Flying Cloud'. After the goods were received when it was found that 9 cartons were in a damaged condition, a survey was got effected through the recognized surveyors. By the report, dated 14th October, 1969, marked as Exhibit B-14, they reported that 5 cartons were sound and that 4 cartons were found completely empty. The *pro forma* claim bill, dated 15th November, 1969, Exhibit A-1 was prepared on this basis, and sent to the defendant's representative, M/s. J. M. Baxi and Company, 21, Thambu Chetty Street, Madras-1, claiming Rs. 20,496 as the cost of 4 numbers of Littons Magnetrone type 7008 AE elr. O 1/d short received along with freight and insurance charges. This was accompanied by a covering letter, dated 19th November, 1969, Exhibit A-2. The second plaintiff an insurer paid the amount to the first plaintiff and got subrogated by Exhibit B-1, dated 27th November, 1969. The Life Insurance Corporation appointed Standard Surveillance Corporation, Madras, to effect the settlement. The said Surveillance Corporation, acting as the agent of the Life Insurance Corporation, prepared the bill Exhibit A-3, dated 21st January, 1970 in which it was mentioned as follows:

> "To value of 4 pcs. Litton Magnetrones type 7008 AE Elr O 1/d, in case No. 4 found empty £660 each.......£2640-00."

It will be seen that instead of saying that 4 cases were found empty the authorised agent had mentioned that in one case, *viz.*, case No. 4, 4 pieces were found empty. This was accompanied by a covering letter Exhibit B-4, dated 21st January, 1970 and addressed to the defendants' representative at Madras. On behalf of the defendants there was a reply on 28th January, 1970 in which it was stated that there was a delay of 9 days in the survey and that during that period the consignment might have been subject to considerable additional handling and damage or pilferage resulting in loss, for which the steamer could not in any way be held liable. It was also pointed out that there were no remarks in the Chief Officer's report regarding the above consignment which further went to prove that the consignment had been landed in a good condition. There was also a querry regarding the absence of Customs Officers at the time when the survey was conducted. Even though the survey was fixed on 25th September, 1969, it was conducted only on 1st October, 1969 and the plaintiff's authorised agent was requested to explain the delay in the survey. By a letter, dated 2nd March, 1970, the plaintiff's authorised agent advised the defendants' representative that the 'cartons in question' was annotated as empty and, therefore, the carrier was properly liable. As no customs duty had been claimed, it was pointed out, that the absence of the Customs Officer was irrelevant. On 3rd March, 1970, there was again a letter by the defendant reminding about the absence of a reply to Exhibit A-4, dated 28th January, 1970 written by the defendants to the plaintiff's agent. In this letter written by the defendant itself marked as Exhibit A-6 it was added:

> "You will note that as per clause No. 17 of the relative Bill of Lading, the liability per package is limited to 500. Hence your claim must be limited to 500 equivalent to Rs. 3,753-75. Please arrange to resubmit us your claim bill on the above lines. Your original claim bill is returned herewith."

The plaintiffs thereupon sent a revised bill for Rs. 3,753-75 under Exhibit B-7, dated 9th March, 1970 and in that letter it was stated as follows:

> "As desired we enclose our amended bill for Rs. 3,753-75 and shall be obliged if you will let us have your cheque in settlement at your earliest."

Some other details were called for by the defendant under Exhibit A-7 from the plaintiffs' agent. Ultimately under Exhibit B-10, letter dated 23rd March, 1970, an indemnity letter was taken from the plaintiffs' agent. There was also a receipt under Exhibit B-9, taken from the plaintiffs' agent and this is dated 28th March, 1970, in which it is stated:

"In settlement of claim for loss out of 20 cartons electron tubes ex s.s. Flying Cloud, of 22nd September, 1969, New York, Madras—Bill of Lading No. 30."

The defendants' representative in Madras paid the amount by cheque to the plaintiffs' representative observing that "it was towards settlement of your following bill."

6. It was, thereafter, discovered by the plaintiffs' agent that actually 4 cartons were found empty and that the total liability should be 2000 at the rate of 500 per carton as against only 500 as claimed under the revised bill. The plaintiffs' agent, therefore, made a demand on the defendants' agent or representative for payment of Rs. 11,261-25 being the balance. This was forwarded to the defendants who were of the opinion that once the claim had been settled and finalised, it could not be reopened and, therefore, regretted their inability to pay. After some further correspondence, the suit claim came to be made and it has been dismissed.

7. In the correspondence there is reference to 'annotation' by the Port Trust and this annotation is borne out by Exhibit A-5, dated 21st February, 1970. It is stated that 9 cartons were annotated at the time of landing. The annotation was as follows:

"4 cartons—'cover torn and contents falling out'.

3 cartons—'damaged'.

2 cartons—'empty'."

The learned counsel for the respondent submitted that in view of the Port Trust's contention that only 2 cartons were found empty, the survey report as if 4 cartons were found empty would not be correct. In this submission the report of the surveyor that 4 cartons were empty may be due to the pilferage or loss during the custody of the Port Trust. The contention is that even with reference to these 2 cartons, at any rate, it would only be the Port Trust, which would be liable.

8. It is not possible to accept the respondent's submission. In *Surendra Overseas Limited* v. *Union of India*[1], there was no physical delivery of the cargo to the consignee; though the goods were discharged at the quay when the Port Trust took delivery of the goods. In respect of the short landing there was a claim for damages. It was held that when the consignee received the cargo there was a short landing and damage to the goods and that the consignee was entitled to claim damages from the shipping company. Until actual delivery of the goods to the consignee, the consignor or his agent would be liable. As there was short delivery here, the liability is clear. Delivery to Port Trust is not delivery to buyer.

9. The learned counsel for the respondent relied also on another decision in *M/s. K. P. V. Sheik Mohamed Rowther* v. *Trustees of Port of Madras*[1]. In that case, there was a claim for demurrage by the Port Trust from the consignee. It was held that the goods having remained in the custody of the Port Trust on the default of the consignee to satisfy the Customs authorities that the import was authorised the consignee became liable to storage or demurrage charges as owner of the goods, the storage being for the sole benefit of the consignee. It was held that there was no provision in the Act, which gave a recourse to the Port Trust as against the ship owner or the steamer agents for the demurrage charge which was incurred while the goods were in its custody. This decision has no scope for application in the present case, because this is not a case for recovery of any demurrage charges by the Port Trust on account of any default on the part of the consignee. In the present case, the consignee had taken all possible steps to take delivery of the goods. But he could not take delivery because of the goods not being found. In these circumstances, the principle that the owner of the goods has to pay the demurrage charges can have no scope for application. The principle that once the Port Trust had given a receipt to the shipping company after receiving the delivery of the goods, the shipping company is not liable, because of section 39 (3) for any loss or damage is not also relevant in the context of the present claim, because the receipt given by the Port Trust

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1. (1974) 2 M.L.J. 146: 87 L.W. 858: A.I.R. 1974 Mad. 297.

1. I.L.R. (1975) 1 Mad. 59.

to the shipping company is not in evidence and this matter had not been also taken in the Court below so that any evidence on this point could have been produced.

10. The annotation by the Port Trust cannot be conclusive especially when an independent survey had been conducted and a surveyor had made a report. At no stage of the proceedings the surveyor's report was challenged. Therefore, it is too late in the day for the defendant's counsel to argue that the Port Trust having annotated only in respect of 2 empty cartons, the plaintiff cannot make any claim for any larger number. This is a factual objection which should have been taken in the Court below. The report of the surveyor makes it clear that 4 cartons were found empty, and we are concerned with the question as to whether the defendant is liable to make good the value of the 4 cartons subject to the limit fixed in the Bill of Lading.

Section 20 of the Indian Contract Act provides—

> "Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."
>
> *Explanation*.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact."

Section 22 is also material for our present purpose. It runs as follows:

> "A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact."

In this case, the real question is whether it is a unilateral or mutual mistake. If it is a case of unilateral mistake, it could come within the scope of section 22, as the contract would not be voidable. If, however, the mistake is not unilateral, then section 20 would have applied so as to render the agreement void. The agreement for the present purpose is the agreement to receive the sum of Rs. 3,753-75 in full settlement.

11. A case similar to the one here arose before the Court of Appeal in U.K. in *Neuchatel Asphalte Company Ltd.* v. *Barnett*[1]. A company agreed to do certain work for £259. Disputes arose over the way the work had been done. The company had received £125 on account from the other contracting party. However, the company demanded the balance of £134. The other contracting party enclosed a cheque for £75 and on the back of the cheque the words 'in full and final settlement of account' were typed and sent to the company's office. It was stated that a statement of account was also sent, but none accompanied the latter. The Company contended that the sum of £75 had not been accepted in full and final satisfaction and sued for the balance also. In dealing with this claim Denning, L.J., as he then was, pointed out that it was the object or intention that was relevant and that the typed or printed words could not be allowed to make a trap for the unwary. Hodson, L.J., also put it as a matter of intention as to whether the amount had been accepted in full and final settlement. Morris, L.J., referred to an earlier decision in *Day* v. *Mclee*[2]. In that case, Bowen, L.J., had stated as follows:—

> "It seems to me, as a matter of principle as well as of authority, that the question whether there is an accord and satisfaction must be one of fact. If a person sends a sum of money on the terms that it is to be taken if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms under which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim and to cause him to act upon that view. In either case it is a question of fact".

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1. (1957) 1 W.L.R. 356.
2. (1889) 32 Q.B.D. 610.

Morris, L.J., was also of the view in that particular case, the cheque for £ 75 had not been accepted in full and final settlement.

12. *Day* v. *Mclee*[1] was followed in *Shyamnagar Tin Factory Private Limited* v. *Snow White Food Product Company Limited*[2], and also by a Bench of the Patna High Court in the *Union of India* v. *Narayanlal*[3]. The passage from *Day* v. *Mclee*[1], was noticed by the Supreme Court in *Kapoorchand Godha* v. *Mir Nawab Himayatalikhan Azamjah*[4]. Jewellery had in that case been supplied to the Prince of Berar, who had acknowledged them for the value of Rs. 27,79,000. The bill had also apparently been accepted by the Nizam himself. In February, 1949 when Hyderabad was under military occupation, a Committee was set up by the Military Governor to scrutinise all debts of the Prince of Berar and his younger brother. The Committee reported with reference to this claim that the amount should be settled for a sum of Rs. 20,00,000 and the appellants were paid Rs. 20,00,000 in full settlement. He later on filed a suit against the Prince of Berar. The suit claim was decreed in the original side of the Bombay High Court. On appeal the judgment of the trial Judge was reversed by a Division Bench. On appeal to the Supreme Court, the judgment of the Division Bench of the Bombay High Court was confirmed. The passage from *Day* v. *Mclee*[1], has been quoted in the judgment.

13. It is thus clear from these decisions that the background or the intention of the parties has to be examined in order to find out whether there has been an accord and satisfaction. Merely because a cheque drawn on an amount paid in full satisfaction has been accepted, it would not follow that there has been an accord and satisfaction so as to disentitle the plaintiffs from coming forward with a suit for the proper amount.

14. Section 63 of the Contract Act provides that a promisee may dispense with or remit, wholly or in part the performance of the promise made to him, or may extend the time for such performance, or may accept, instead of it any satisfaction which he thinks fit. In order that there may be such dispensing with or remission, wholly or in part of the performance of the contract, there must be a conscious act on the part of the said person. In other words, he must realise that he is taking a smaller amount for a larger amount than is due to him. If there is a mistake as to a matter of fact essential to the agreement, which in this case is the accord and satisfaction, then the agreement would fall under section 20 of the Act. Similarly, if a party, who is alleged to have dispensed with or remitted a part of the performance, was not conscious of the circumstances under which he was accepting a smaller sum, then also it is possible to hold that he has not remitted or dispensed with the performance of the contract.

15. Section 72 of the Contract Act provides for the recovery of the amount paid by mistake or under coercion. That section cannot apply to the present case, because there is no payment by one to another. This is a case where the amount is sought to be recovered, because the full amount due was not paid. Section 72 cannot apply to a case where there is no over payment. It is unnecessary to go into the decisions cited on the question of the recoverability of the amount paid in excess under a mistake of fact or law.

16. It is also unnecessary to go into the decisions of U.K. based on common law, cited before me on the question of mistake, as the matter is governed in India by the provisions of the statute, *viz.*, the Indian Contract Act.

17. I have to examine the facts in this case to find out whether there was any unilateral or a mutual mistake. At the time when the plaintiffs' agent preferred a claim under Exhibit A-3, the Bill of Lading was not available with it. Though by a reference to Exhibit B-14, it could have been discovered that 4 cartons were empty, still on account of some mistake it was thought that one carton contained 4 tubes and that one carton alone was empty. The defendant had at all material times the Bill of Lading. The defendant was also aware of the manner in which the

1. (1889) 32 Q.B.D. 610.
2. A.I.R. 1965 Cal. 551.
3. A.I.R. 1963 Pat. 152,
4. (1963) 2 M.L.J. (S.C.) 94: (1963) 2 An.W.R. (S.C.) 94: (1963) 2 S.C.J. 396: (1963) 2 S.C.R. 168: A.I.R. 1963 S.C. 250.

goods were despatched from New York. In the Bill of Lading, it is clearly stated that there were 20 cartons which contained the tubes. There is also marking 1/20 in the Bill of Lading so as to show that each carton contained one tube. The defendants could, therefore, have verified whether the claim as made by the plaintiffs' authorised agent was proper. It could then have pointed out that 4 tubes could not have been in one carton. If this mistake had been pointed out, the plaintiffs' authorised agent would have made a revised claim. This was not done. Apparently, the Shipping Company also proceeded on the basis that four tubes could have been packed in one carton. Under the bill of lading, the liability was limited to 500 dollars in respect of one package. On the view that there was only one carton which contained the four tubes as claimed by the plaintiffs' authorised agent, the defendants also asked for a revision of the bill. The defendants were thus also under a mistake as to the number of tubes in any carton. I do not think that the defendants were trying to cash in on any mistake of the plaintiffs' authorised agent. There would be misrepresentation if the defendants, being aware of each tube packed in a separate carton, wanted to induce the plaintiffs' agent to make out a claim for a single package, as if 4 tubes were in one single package. It would not be proper to attribute such unethical practices to a company which has world-wide connections. In my view, the defendant was also under a *bona fide* mistake in thinking that four tubes were packed in a single carton. In one view, it would be a case of misrepresentation, as the defendants would not be unaware of the number of the tubes in a package. In such circumstances, if they made a representation that the claim had to be restricted to one package containing four tubes, it could even amount to a deliberate attempt at misleading the plaintiffs. However, the inference of mistake would in the context of the facts here seem more probable or reasonable. I do not, therefore, accept the contention of misrepresentation put forward for the appellant.

18. The result is that under section 20 of the Indian Contract Act, the agreement to receive the sum of Rs. 3,753-75 in full satisfaction would be avoided and the plaintiff would be entitled to receive the balance. The plaintiffs are thus entitled to a decree. As the second plaintiff has already paid the amount to first plaintiff, there will be a decree in favour of the second plaintiff as against the defendants. The appeal is accordingly allowed with costs.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam and S. Ratnavel Pandian, JJ.*

A. Krishnaswamy .. *Petitioner**

v.

The Tamil Nadu Electricity Board Madras, by its Secretary .. *Respondents*

Constitution of India (1950), *Article* 226—*Tamil Nadu Electricity Board—Enquiry against an employee—Board can delegate its functions—Enquiry Officer refusing to recall prosecution witnesses for further cross-examination—Principles of natural justice not violated—High Court not an appellate Court over the findings of the enquiry officer—Order of punishment not meeting with the requirements of Regulation* 11 (b)—*Writ of* certiorari *issued—Tamil Nadu Electricity Board Employees' Discipline and Appeal Regulations, Regulation* 11 (b).

The Tamil Nadu Electricity Board being a statutory body consisting of numerous members could delegate its functions of conducting an enquiry against any employee to its subordinates so long as there was no prohibition against such delegation under the statute. [*Para.* 3.]

In the circumstances of this case the enquriy officer could not be taken to have violated the principles of natural justice in refusing to recall the prosecution witnesses once again for the purpose of further cross-examination. [*Para.* 5.]

The High Court exercising its powers under Article 226 of the Constitution could not treat itself as an appellate Court over the findings of the enquiry officer. [*Para.* 6.]

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*W.P. No. 214 of 1977. 20*th March*, 1979.

In the present case the order of punishment did not set out the grounds on which the punishment was based as required under Regulation 11 (*b*) which should be independent of the findings rendered by the enquiry officer. So long as Regulation 11 (*b*) contemplated separate grounds to be stated in the order of punishment apart from the findings rendered by the enquiry officer, the Board was bound to give its reasons at the stage of imposition of the punishment. In this case the order of the Board merely said that after considering the explanation of the petitioner and the written representation, the Board had decided that the punishment of removal from service was warranted. This could not be said to be the grounds contemplated in Regulation 11 (*b*). Though the conduct of enquiry was valid, the ultimate order of punishment did not satisfy the requirement contemplated by regulation 11 (*b*). [*Para.* 8.]

Cases referred to:—

Reg v. *Race Relations*, Ex parte, *Selvarajan*, (1975) 1 W.L.R. 1686; *Reg* v. *Gaming Board for Great Britain*, Ex parte, *Bemian and Khaida*, (1970) 2 Q.B.417 : (1970) 2 All E.R. 528 : (1970) 2 W.L.R. 1009; *Pergamon Press Ltd.*, In re, (1970) 3 All E.R. 535 : (1970) 3 W.L.R. 792 : (1971) Ch. 388; *Wiseman* v. *Borneman*, (1971) A.C. 297: (1969) 3 All E.R. 275 : (1969) 3 W.L.R. 706; *Ved Parkash Malhotra* v. *State Bank of India*, I.L.R. (1974) 1 Del. 660.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records and other proceedings culminating in the order passed by the respondent herein in its proceedings Ms. No. 2094 dated 30th December, 1976, removing the petitioner from srvice and quash the same.

K. Ramaswami, *A. Sarojini Bai* and *V. Venkataswami*, for Petitioner.

S. Sivasubramaniam and *M. Shakir Ali*, for Respondent.

The Order of the Court was made by

Ramanujam, J.—The petitioner herein was appointed as a junior electrical engineer under the Tamil Nadu Electricity Board, the respondent herein on 6th July, 1955. Later he was promoted as Assistant Engineer (Electrical). While he was working as Assistant Engineer (Electrical) at Thammampatti, Salem District, between 16th April, 1969 and 26th July, 1970 some complaints had been received against him by the respondent. On the basis of the said complaints a charge memo dated 5th June, 1972, containing a list of five charges was served on him on 15th June, 1972 by the respondent while the petitioner was working as Assistant Engineer (Electrical) at Vellore After the petitioner submitted his explanation to the charges alleged against him in the charge memo, an oral enquiry was conducted. After the conclusion of the oral enquiry, the enquiry officer, one K.U. Krishnan, who was the Divisional Engineer (Electrical), Salem, submitted his report holding that charges 1 to 3 had been proved while the other two charges had not been proved. On receipt of the report, a show cause notice has been issued by the respondent dated 21st September, 1974 and on 7th November, 1974 the petitioner received the same. In the show cause notice the petitioner was called upon to show cause, why he should not be removed from service. The petitioner submitted his representation on 4th December, 1974 and prayed for another personal hearing by the Board. On receipt of the representation, the respondent decided to give the petitioner a personal hearing again and he was asked to appear before the Board on 10th August, 1976 for personal hearing. But the personal hearing was given by the technical member of the Board and not by the entire Board. After the said personal hearing, the respondent passed a final order dated 30th December, 1976 removing the petitioner from service.

2. The said order removing the petitioner from service has been challenged in this writ petition on the following grounds: (1) The Electricity Board was not legally competent to nominate the enquiry officer namely the Divisional Engineer for holding an enquiry as there is no power vested in the Board to delegate its functions to any subordinate authority such as the enquiry officer and therefore the nomination of the enquiry officer was without jurisdiction. (2) The enquiry conducted by the enquiry officer was not in accordance with the statutory rules framed for conducting enquiries against the employees of the respondent. (3) The enquiry conducted against the petitioner by the enquiry officer was opposed to the principle of natural justice in that the prosecution witnesses were not recalled for further cross-examina-

tion as desired by the petitioner. (4) The findings rendered by the enquiry officer on the three charges which he held proved cannot be sustained on the materials produced at the enquiry. (5) The impugned order terminating the petitioner's services is vitiated for the reasons that the personal hearing offered to the petitioner after the issue of the show cause notice proposing penalty was by the technical member and not by the full Board which alone can hear the petitioner as a punishing authority. (6) The respondent Board was merely guided by the enquiry officer's report which according to the petitioner is one-sided and biased, in terminating the petitioner's services without independently applying its mind to the materials on record with reference to the charges.

3. As regards the first ground, the respondent in its counter-affidavit has submitted that the Electricity Board being a statutory body is authorised to delegate its powers to any officer of the Board to take action against its employees and to conduct enquiry in relation to charges of misconduct. It is said that the Board has on 24th November, 1971 authorised the Chief Engineer (Electricity) to take action against the petitioner, that the Chief Engineer in his turn directed the Superintending Engineer, Mettur Electricity System on 9th December, 1971 to take action against the petitioner and that the Superintending Engineer, Mettur Electricity System in turn appointed the Divisional Engineer (Thiru K. U. Krishnan) as enquiry officer by his proceedings dated 3rd January, 1972 and that is the procedure prescribed for every departmental proceeding. In our view, the respondent being a statutory body consisting of numerous members can delegate its functions of conducting an enquiry against any employee to its subordinates so long as there is no prohibition against such delegation under the statute. The respondent cannot be expected to take even minor steps at the lowest level. In this case the Board has directed its subordinates to take action against the petitioner by framing charges and conducting an enquiry, and the Board which is the punishing authority has passed final orders in the matter. Therefore the entrustment of the actual conduct of the enquiry to its subordinate officers by the Board cannot be said to be without jurisdiction. As a matter of fact Regulation 8 (b) of the Tamil Nadu Electricity Board Employees' Discipline and Appeal Regulations provides for such delegation and that provision is as follows:

"In every case where it is proposed to impose on an employee any of the penalties in items (vi) to (viii) in regulation 5, he shall be given a charge-sheet setting forth the grounds on which it is proposed to take into consideration passing orders on the case. He shall be required to answer the charge or charges in a written statement within reasonable time not exceeding one month and also to state whether he desires an oral enquiry or to be heard in person or both. An oral enquiry shall be held if the employee desires such enquiry, or if so directed by the authority concerned. At that enquiry oral evidence shall be heard as to such of those allegations as are not admitted. The employee shall be permitted to produce witnesses in his defence and cross-examine any witness on whose evidence the charge rests. The Officer conducting the enquiry may, for special and sufficient reasons to be recorded in writing, refuse to call a witness. The enquiring officer shall ask, in writing, the delinquent employee immediately after the enquiry is over, whether he had a reasonable opportunity of presenting his case or if he has any complaint in this regard. If there is any complaint in this regard, the enquiring officer will examine the complaint and set right the matter. If it is considered that the alleged denial of reasonable opportunity is made with a view to delay the disciplinary proceedings, the enquiring officer will be competent to ignore the complaint and the reasons for not complying with the request should be recorded. After the enquiry has been completed, the person charged shall be entitled to put in, if he so desires, further written statement of his defence.

After the enquiry, personal hearing referred to in the first sub-paragraph has been completed and after the authority competent to impose the penalty mentioned in that paragraph has arrived at provisional conclusions in regard to the penalty to the imposed, the person charged shall be supplied with a copy of the report referred to in para. I of the regulation 8 (b) of Tamil Nadu Electricity Board Discipline and Appeal Regulation and be called upon to show cause, within a reasonable time not ordinarily exceeding one month, against the parti-

cular penalty proposed to be inflicted. An representation shall be based only on the evidence adduced during the enquiry.

Explanation.—An opportunity to show casue against the imposition of any of the penalties referred to in this sub-regulation shall be given, after the authority competent to impose the penalty arrives at a provisional conclusion in regard to the penalty to be imposed either by such authority himself or under his direction, by a subordinate authority who is superior in rank to the employee on whom it is proposed to impose the penalty".

4. As regards the second ground, the counter affidavit states that the enquiry officer acted fairly and without any bias, and there is no violation of any of the statutory rules. Though the petitioner has alleged in the petition that the statutory rules have not been followed by the enquiry officer, our attention has not been drawn to any specific rule which is said to have been violated by the enquiry officer. Therefore we are of the view that this complaint has no merit at all.

5. As regards the third ground of attack that the principles of natural justice have been violated by the enquiry officer in not recalling the Board's witnesses, the counter-affiadvit admits the refusal by the enquiry officer to recall the witnesses, but it is said that the mere refusal by the enquiry officer to permit recalling of the prosecution witnesses at the whims and fancies of the petitioner will not amount to violation of the principles of natural justice. It is not in dispute that the petitioner cross-examined the prosecution witnesses at the earlier stage of the enquiry. However, the petitioner's request to recall the prosecution witnesses once again for further cross-examination was refused by the enquriy officer presumably on the basis that no recalling of the prosecution witnesses once again was justified. In this case for recalling the witnesses. once he has cross-examined the prosecution witnesses extensively at the earlier stage of the enquiry. We are therefore of the view that in the circumstances of this case the enquiry officer cannot be taken to have violated the principles of natural justice in refusing to recall the prosecution witnesses once again for the purpose of further cross-examination.

6. On the fourth ground, it is to be remembered that this court exercising its powers under Article 226 of the Constitution cannot treat itself as an appellate court over the findings of the enquiry officer. The findings of the enquiry officer which have been accepted by the disciplinary authority, can be attacked only if there is no material at all to sustain those findings, and they are perverse. In this case the enquiry officer has referred to the evidence of the various witnesses and ultimately given his findings on the basis of the materials. It is not open to this Court to reappraise the oral evidence so as to find whether the appreciation of the evidence by the enquiry officer was correct or not. As this Court cannot interfere with the findings of the enquiry officer on the basis of its fresh appraisal of the evidence, we reject this contention.

7. As regards the fifth ground of attack, it is not disputed by the respondent that the personal hearing given to the petitioner was only by the technical member and not by the full Board. The question is whether such a procedure can be taken to be valid. According to the petitioner the show cause notice was given by the Board and he sought an oral hearing only by the full Board and not by one member of the Board, and the show cause notice having been given by the Board he has to satisfy the Board as regards his innocence, and as such hearing by one member of the Board cannot be taken to be a hearing by the entire Board. It is said that in view of the fact that one member of the Board gave a personal hearing, the Board had been only guided by the impression gathered by that member at the personal hearing and that the petitioner has, therefore, lost a valuable right of making a personal representation to the entire Board and convincing it about his innocence. The counter-affidavit, does not deal with this ground of attack at all. However, we are not inclined to agree with the petitioner that the personal hearing should be given only by the full Board and not by a member of the Board even if he had been specifically authorised to do so by the Board. Though the counter-affidavit is silent on this point, one can presume that the Board has authorised the technical member to give a personal hearing to the petitioner, especially when the Board has called upon the petitioner to appear before the Board for a personal hearing and the hearing has actually given by the technical member. We have to proceed, therefore, on the basis that the technical

member has been duly authorised by the Board to give a personal hearing to the petitioner and report the matter to the Board. It has to be pointed out that the petitioner also did not object to the procedure at the time of oral hearing on the ground that the full Board alone should hear him. It is well-established that a statutory body composed of numerous individuals can delegate its authority to an officer or authority subordinate to it to act on its behalf in the matter of conducting a disciplinary enquiry. It is not possible for such a body, composing of numerous individuals to hear personally every employee against whom disciplinary proceedings had been taken. Lord Denning, M.R. in *Reg* v. *Race Relations Ex. parte P. Selvarajan*[1] dealing with the functions of the Race Relations Board constituted under the Race Relations Act, 1968 expressed :

"In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion. Notably the Gaming Board, who have to enquire whether an applicant is fit to run a gaming club see *Reg* v *Gaming Board for Great Britain*, Ex parte. *Benam and Khaida*[2]; inspectors under the Companies Act, 1948 who have to investigate the affairs of a company and make a report; see In re *Pergamon Press Ltd.*[3] and Commissioners of Inland Revenue who have to determine whether there is a *prima facie* case; see *Wiseman* v. *Borneman*[4]. In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends upon the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties or be exposed, to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely afflicted by the investigation and report, then he should be told the case made against him and he afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover, it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But in the end, the investigating body itself must come to its own decision and make its own report".

The same Law Lord dealing with the power of delegation by the Board of certain functions to some of its members expressed the view thus:

"If this had been a judicial body, I do not think this would be right. Every member of a judicial body must have access to all the evidence and papers in the case, he must have heard all the arguments, and he must come to his own conclusion. The maxim *delegatus non protest delegare* applies strictly to judicial functions. But it is different with a body which is exercising administrative functions or which is making an investigation or conducting preliminary inquiries, especially when it is a numerous body. The Race Relations Board has 12 members. The employment committee has seven members. It is impossible to suppose that all of them need sit to determine a matter, or that all of those who sit should have read all the papers or heard all the evidence. But I do not think that two or three, at any rate must have done so. If there is a quorum of, say, three, I should think a quorum must have done so. That is the ordinary accepted method of carrying on business. It should be applied here, also".

Lawton, L.J. expressed his view in the same case thus:

"For my part, I can see no reason at all why the board should not delegate to its staff the function of collecting information It would be impractical for the members of the board themselves to make investigations. How the board does what Parliament has entrusted it to do is not a matter for the Courts to decide as long as it acts fairly and in good faith. It is for the board, not the Courts, to decide how much information each of its members should have when considering a particular case. As long as the board or one of its constituent committees.

1. (1975) 1 W.L.R. 1686.
2. (1970) 2 Q.B. 417: (1970) 2 All E.R. 528: (1970) 2 W.L.R. 1009.
3. (1970) 3 All E.R. 535: (1970) 3 W.L.R. 792: (1971) Ch. 388.
4. (1971) A.C. 297: (1969) 3 All E.R. 275: (1969) 3 W.L.R. 706.

has enough information to enable it to make a fair assessment of the case, the Courts will not interfere. How it gets the information is for the chairman and his advisers to decide. He may decide in a particular case that each member of the board, or the committee, should have a copy of the whole file. In another case he may consider that the case can be adequately and fairly dealt with if one member has the file and reports to the others what is in it. In this case, three members of the employment committee had a copy of the complete file. This was enough to enable the committee to deal with the applicant's case fairly."

Scarman, L.J. was of the view that :

> "The board is, of course, subject to the supervisory powers of the High Court. If it fails to perform a statutory function, *mandamus* will lie. If it fails to act fairly, the High Court can intervene by *certiorari* prohibition, or *mandamus* to ensure that it does. Subject to such supervision (the limits of which in the case of an administrative agency charged with making decisions that directly affect private persons are by now well-known), the Race Relations Board- not the Courts-decides in its field how to go about the task of securing compliance with the law and resolving differences."

In *Ved Parkash Malhotra* v. *State Bank of India*[1] it has been pointed out that in respect of institutional decisions it cannot be expected that the institution has to act as full body always, and that the institution can devise its own procedure in carrying out its duties. Having regard to the principle laid down in the above cases we are of the view that in this case the mere fact that personal hearing was given by the technical member record of which he had submitted to the Board is not improper. Admittedly the the decision has been taken by the full Board in this case and, therefore, the enquiry proceedings cannot be said to be vitiated.

8. However, the last ground that the respondent Board did not apply its mind independently to the materials on record and that the Board has not strictly acted in accordance with the Regulation 11 seems to have some substance. Regulation 11 dealing with "record of enquiry" says in Clause (*a*) that the authority imposing any penalty under the regulations shall maintain a record showing; (*i*) the allegations upon which action was taken against the person punished; (*ii*) the charge framed, if any, (*iii*) the person's representation, if any, and the evidence taken, if any, and (*iv*) the finding and the grounds thereof, if any. As per clause (*b*) of that regulation, apart from the findings and the grounds thereof given by the enquiry officer, the order of punishment passed by the disciplinary authority should also state the grounds on which they are based; Regulation 14 (*a*) (*i*) gives an employee against whom the board has passed an order of punishment a right to seek a review on any of the grounds set out in that regulation. Here the enquiry officer has rendered his findings in his report dated 27th June, 1973. The Board in its show cause memorandum dated 21st September, 1974, after referring to the charges framed against the petitioner and the findings thereon given by the enquiry officer states as follows:

> "After careful examination of all the connected records and the written statements of the Assistant Engineer (Electrical), the Tamil Nadu Electricity Board has come to the provisional conclusion that Thiru A. Krishnaswamy Assistant Engineer, (Electrical) is guilty of the charges which have been held proved beyond doubt and that therefore Thiru A. Krishnaswamy, Assistant Engineer (Electrical) should be removed from service."

Later, after the petitioner submitted his objections to the show cause notice proposing punishment of removal from service and after giving a personal hearing to him on 10th August, 1976, the Board passed the impugned order. The said order, after referring to the charges and the findings of the enquiry officer contains the following operative portion :

> "The Tamil Nadu Electricity Board has carefully considered the explanations of Thiru A. Krishnaswamy, Assistant Engineer (Electrical) and also the written representation given by him during the personal hearing and has decided that the punishment "removal from service" is warranted. The Board accordingly directs that Thiru A. Krishnaswamy, Assistant Engineer (Electrical) be removed from the service of the Board."

The above extracts from the show cause notice and the final order of the Board do not in-

1. I.L.R. (1974) 1 Delhi 660.

dicate that apart from the findings given by the enquiry officer the Board has itself applied its mind to the materials on record. Regulation 11 (b) contemplates the order of punishment containing the grounds on which the punishment is based. In this case the operative portion of the show cause notice merely states that after careful examination of all the connected records the Board had come to the provisional conclusion that the petitioner is guilty of the charges which have been held proved and that, therefore, he should be dismissed from service. In the operative portion of the ultimate order the Board merely says that it considered the explanation and also the written representation made by the petitioner during the personal hearing and has decided that the punishment of removal from service is warranted. This order of punishment does not set out the grounds on which the punishment is based as required under Regulation 11 (b) which should be independent of the findings rendered by the enquiry officer. Though the enquiry officer has given his finding in relation to each charge the Board does not independently consider the material and say whether it agrees with the findings of the enquiry officer in respect of each charge. So long as regulation 11 (b) contemplates separate grounds to be stated in the order of punishment apart from the findings rendered by the enquiry officer, the board is bound to give its reasons at the stage of imposition of the punishment. In this case, the order of the Board merely says that after considering the explanation of the petitioner and the written representation the Board has decided that the punishment of removal from service is warranted. This cannot be said to be the grounds contemplated in Regulation 11 (b). We are, therefore of the view that though the conduct of enquiry is valid, the ultimate order of punishment does not satisfy the Requirement contemplated by regulation 11 (b).

9. The impugned order is therefore set aside and the writ petition is allowed. It is however made clear that it is open to the Board to pass a fresh order in accordance with the said regulation. There will, however, be no order as to costs.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction).

PRESENT:— *V. Ramaswami, J.*

R. Kantnimathi .. *Petitioner**

v.

State of Tamil Nadu, represented by the Secretary to Government, Education Department, Madras-9. .. *Respondent*

Fundamental Rules, Rule 56 (d)—*Compulsory retirement of petitioner from Educational Service, on petitioner attaining the age of* 50 *years—No reference of petitioner's case to Review Committee—Guidelines and Instructions not followed—Order of compulsory retirement set aside.*

Rule 2 of the Fundamental Rules enables the State Government in relation to service under their administrative control to make rules modifying or replacing any of the Fundamental Rules. The Fundamental Rules framed originally under section 96 of the Government of India Act, 1919 and later coming under Article 313 of the Constitution of India, have statutory force and as such Rule 56 (d) of the Rules is a statutory rule. [*Para.* 9].

G.O. Ms. No. 761. Public (service-A) dated 19th March, 1973 and the subsequent Government Order relating to the procedure to be followed for review of cases of Government servants for compulsory retirement are guidelines and instructions intended to fill up the gaps in the rules and to ensure uniformity of operation and equitable treatment in all cases of premature retirement under Rule 56 (d). The rule itself does not contain any guidelines, direction or criteria and the instructions issued by the Government are intended to furnish a uniform procedure in the application of the Rule. [*Para.* 10.]

Under G. O. Ms. No. 775 (Personal and Administrative Reforms (Per.R) dated 4th July, 1978, the competent authority is enabled to review the case for a second time when the Government servant attains the age of 53 years. This second Government Order and extension provided for in Paragraph VII of Annexure II to G.O. Ms. No. 761 (Public) dated 19th March, 1973 enabling the Government to have a fresh review when there is

* W.K. Nos. 7493 and 7494 & 1975 *6th Febrauary, 1979.*

justification for any exceptional reason such as his subsequent work or conduct or the state of his physical health which may necessitate his earlier retirement, do not in any way affect the legal position or the need to consider the case of every Government servant six months before he attains the age of 50 years. If a case was referred to the Review Committee six months before 50 years, the question of his case being considered subsequent to 50 years on the material available before 50 years does not arise for consideration. But in a case where, as in the case of the petitioner, it was not referred to the Review Committee six months before the Officer attained the age of 50 years it is not possible for the Government to consider for the first time a review subsequent to the person's attaining the age of 50 years. It may be mentioned, that the normal retirement age of an officer belonging to All India Service is 58 years. The guidelines issued in pursuance of the rules which are in *pari materia* with paragraph VII of Annexure II of G O. Ms. No. 761 dated 19th March, 1973, also stated that once it was decided to retain an officer beyond the age of 55 years, he should be allowed to continue up to the age of 58 without any fresh review unless it is to be justified by any exceptional reasons such as subsequent work or conduct or the state of his personal health which may make earlier retirement really desirable. The reason for this is stated to be, in the said guideline, that the Government felt that in order that an officer who is cleared for continuance on attaining the age of 55 years can settle down to another three years of work with a sense of security and those working under him accept his control and discipline without any reservation and that an annual revision between the years of 55 and 58 would not be desirable. In arriving at this view, they have to, among other factors, take into consideration the fact that at those stages, members of All India Services generally occupy very senior appointments on which particularly such a sense of security about their tenure is desirable in the public interest. Those considerations of the Government of India referred to in the guidelines equally apply to the State Government Servants. [*Para.* 13.]

The impugned Government Order also has not referred to any subsequent work or conduct or the state of the petitioner's physical health as necessitating the compulsory retirement. In these circumstances, the impugned Government Order compulsorily retiring the petitioner on attaining 50 years is clearly violative of the guidelines or the procedure prescribed in the matter of compulsory retirement and therefore invalid [*Para.* 13.]

Case referred to :—

State of U. P. v. *Chandra Mohan*, (1978) 1 Lab.L.J. 6: (1977) 4 S.C.C. 345 : (1977) 3 All.L.R. 673 : (1978) 1 S.C.R. 621 : A.I.R. 1977 S.C. 2411.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue (*i*) a writ of *certiorari* calling for the records of the respondent in G.O Ms. No. 1674, Education dated 1st October, 1975 and quash the said order in Writ Petition No. 7493 of 1975), and (*ii*) a writ of *certiorari mandamus* calling for the records of the respondent in G.O. Ms. No. 624, Education Department dated 19th April, 1975, and quash the said order directing the Government to appoint the petitioner in the cadre of the Joint Director of Education with effect from 25th October, 1969 with all the concommittant emoluments and benefits (in Writ Petition No. 7494 of 1975).

K. Parasaran, for *V. Srinivasan* and *Radha Srinivasan*, for Petitioner.

The Advocate-General assisted by *C. Chinnaswami*, for Respondent.

The Court made the following

ORDER.—The petitioner was directly recruited to the Administrative section of the then Women's Branch of the Madras Educational Service and posted as Superintendent on the 13th March, 1950. On completion of probation she was confirmed as Permanent Inspectress of Schools, Madurai, with effect from the date of her appointment. Subsequently there was an amalgamation of the Men's Branch of the Madras Educational Service with the Women's Branch and the Madras Educational Service was reconstituted in 1955 In 1962 some officers who were juniors to the petitioner were promoted to the cadre of Deputy Director of Education and Divisional Inspector of Schools. She was protesting against this overlooking of her seniority. Subsequently on 25th July, 1966 she was

promoted to the combined cadre of Deputy Director and Divisional Inspector of Schools. The next promotional post was that of Joint Director of Public Instruction. Her claim for promotion to this post was not considered and some other officer was appointed as Joint Director of Public Instruction in G.O. Ms. No. 1615, Education dated 25th October, 1969. At this stage the petitioner filed two writ petitions, W.P. No. 3886 of 1970 for a direction to fix her seniority over those who were promoted earlier than her as Deputy Directors and W.P. No. 3885 of 1970 for quashing the order of appointment as Joint Director of Public Instruction and to consider her claim to that post. By an order dated 24th September, 1974, this Court held that her claim for seniority over those who were promoted as Deputy Directors earlier to her promotion on 25th July, 1966 cannot be accepted though the persons who were promoted earlier were juniors to the petitioner in the cadre of Inspectors. But all the same, this Court held that though she is junior to the others, her claim for promotion as Joint Director has to be considered along with the claims of other persons who are eligible for appointment as Joint Directors and since the Government conceded that her claim was not considered at the time when the Joint Director was appointed in G.O. Ms. No. 1615, Education dated 25th October, 1969, the writ petition for quashing of that order was allowed. This Court directed that the promotion made in the Government Order dated 25th October, 1969 cannot be treated as final and that the Government should consider her case also for promotion along with the other officers who were considered at the time of passing the said Government Order. The ultimate result was, the writ petition relating to claim of seniority was dismissed but the one relating to the claim to be considered for promotion as Joint Director along with the other persons was allowed. Subsequent to this order of this Court, the Government in G.O. Ms. No. 624, Education dated 19th April, 1975, have stated that they have reconsidered the claim of the petitioner along with the other officers in service who were eligible under the rules for promotion to the post of Joint Director of School Education as on 25th October, 1969 and that they have decided after a careful consideration that the petitioner was not fit for promotion and the promotion already made in G.O. Ms. No. 1615 dated 25th October, 1969 need not be modified. The petitioner appears to have been making her representations against this Government Order as not following the directions of this Court, but in the meantime, in G.O. Ms. No. 1674, Education dated 1st October, 1975, the petitioner was compulsorily retired from service under Fundamental Rule 56 (*d*). The petitioner has filed Writ Petition No. 7493 of 1975 for the issue of a writ of *certiorari* to quash the order of the Government dated 1st October, 1975 in G.O. Ms. No. 1674 compulsorily retiring her from service. She has also filed Writ Petition No. 7494 of 1975 praying for a *certiorari* filed *mandamus* to quash the Government Order No. 624 Education dated 19th April, 1975 and to direct the Government to appoint her in the cadre of Joint Director of Education with effect from 25th October, 1969 with all the concommitant emoluments and benefits.

2. As regards the claim for promotion, the contention of the learned counsel for the petitioner is that the order of the Government had not given any reason, much less a valid reason, for rejecting her claim and as a non-speaking order, it is liable to be quashed. In the impugned order, after referring to the filing of the writ petitions and orders of this Court, the Government have stated that they have reconsidered the claim of the petitioner along with the other officers in service for promotion to the post of Joint Director, School Education, as on 25th October, 1969 as directed by this Court. It further stated that the Government decided after a careful consideration that the petitioner was not fit for promotion. In the counter-affidavit filed by the Government it has been stated that the petitioner was not one of the senior-most of persons holding the post of Deputy Director when the vacancy arose in the post of Joint Director, that the senior persons of the category of Chief Educational Officer and Deputy Director of School Education were found suitable and that therefore they were appointed. The learned counsel contended that these reasons are also erroneous and not valid. This Court had already held that the

petitioner was not the senior in the category of Chief Educational Officer/Deputy Director of School Education over the other persons who were promoted as Joint Directors. It is now stated in the impugned Government Order that the petitioner's claim was reconsidered along with the other persons who are eligible for promotion, that the officers who were senior to the petitioner were found suitable and that the petitioner was not fit for promotion. This ground cannot be stated to be extraneous or irrelevant for consideration of promotion. As to whether the petitioner was fit for promotion as on 25th October, 1969, the authority competent to decide is the Government and this Court could not substitute its opinion on the same. Apart from the question whether the petitioner was fit for promotion or not, since her seniors were found to be fit and their merit was found not in any way inferior to that of the petitioner, even as per the rules relating to promotion, there has been a strict compliance with the rules. The relevant rule only requires, where promotion shall be made on the ground of merit and ability, seniority being considered only where the merit and ability are approximately equal. For one thing, in this case, the merits of the petitioner and her seniors were found not equal and secondly the persons who were promoted were seniors to the petitioner. The impugned Government Order, therefore suffers from no infirmity and calls for no interference. Writ Petition No. 7494 of 1975 is therefore dismissed.

3. The validity of compulsory retirement is questioned in the affidavit on various grounds. The scope and validity of rule 56 (*d*) of the Fundamental Rules was raised in a number of writ petitions. These petitions along with W.P. No. 7493 were posted before a Division Bench. The Division Bench took into consideration only those questions which raised a common issue and after deciding those common issues, relegated the writ petitions to be disposed of on merits with reference to each individual writ petition. That is how this writ petition has again come up before me for consideration.

4. The learned Advocate-General contended that the petitioner shall not be permitted to raise this question of validity of compulsory retirement on the ground that this point was not pressed before the Bench when they dealt with the validity of rule 56 (*d*). I am unable to agree with this contention of the learned Advocate-General. As already stated the question raised before the Bench related to common points arising in all the writ petitions and with reference to the validity of rule 56 (*d*). The merits of each individual case was not considered and in fact it is only for the said purpose, the cases were directed to be posted before a single Judge. Except the points that were covered by the decision of the Bench, all other points were left open. Therefore no question of *res judicata* or barring the consideration of the validity of the impugned Government Order compulsorily retiring the petitioner from service arises. This objection of the learned Advocate-General is therefore overruled.

5. The contention of the learned counsel for the petitioner in this case is that since the petitioner had attained the age of 50 years on 14th February, 1974, her date of birth being 14th February, 1924, her case should have been sent to the Review Committee before the first of July, 1973 as required by the guidelines and instructions issued by the Government in respect of compulsory retirements under rule 56 (*d*), but her case was not referred to the Review Committee till about the end of August, 1975. In the further affidavit filed in W.M.P. No. 3996 of 1977, the petitioner had further stated:

> "I reliably understand and believe the same to be true that my case was referred to the Review Committee only sometime in August, 1975 and I have been served with the order of compulsory retirement dated 1st October, 1975. This will make it very clear that my case was never thought of to be referred to the Review Committee earlier at the appropriate time till the judgment in my earlier writ petition was delivered, *viz.*, 24th September, 1974. Only consequent on the result of the writ petition the respondent would appear to have decided to refer my case to the Review Committee out of spite and vindictiveness".

No counter-affidavit was filed to this additional affidavit though it was served on the respondent, but the learned Advocate-General who

appeared on behalf of the Government represented that the proposal to consider the case of the petitioner was sent to the Review Committee only on 4th September, 1975 and that the Review Committee considered the claim on 5th September, 1975. On receipt of the recommendation of the Review Committee, the Government issued the impugned order on 1st October, 1975. Therefore, there is no dispute about the fact that the case of the petitioner was not referred to the Review Committee, six months prior to her attaining the age of 50 years. The question for consideration is whether in the circumstances, the compulsory retirement of the petitioner could be said to be in accordance with rule 56 (*d*) of the Fundamental Rules and the relevant guidelines and instructions issued by the Government in the matter of compulsory retirement.

6. The Santhanam Committee on Prevention of Corruption set up by the Government of India has recommended that:

> "The Government should have the power to retire compulsorily a Government servant who has completed 25 years of qualifying service or has attained 50 years of age without giving any reason and without any liability for compensation. There should be a Committee with the Central Vigilance Commissioner, as the Chairman and two Secretaries to Government as Members to review the cases of all Gazetted Officers who are due to complete 25 years of qualifying service or to attain 50 years of age during the ensuing year to recommend the names of the Officers who are to be compulsorily retired".

7. This recommendation was accepted by the Government of Tamil Nadu and in G.O. Ms. No. 546 Public (Services-A) dated 1st March, 1972 directed that the appropriate authority shall, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant by giving him a notice of not less than three months in writing or three months' pay and allowances in lieu of such notice after he has attained the age of 50 years or after he has completed 25 years of qualifying service. In pursuance of this Government Order, the Fundamental Rules also were amended by introducing clause (*d*) of rule 56 by G.O. Ms. No. 1537, Finance (FR) dated 30th November, 1972. Clause (*d*) of rule 56 reads as follows:

> "Notwithstanding anything contained in this rule, the appropriate authority shall, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice, after he has attained the age of fifty years or after he has completed twenty-five years of qualifying service. Any Government servant who has attained the age of fifty years or who has completed twenty-five years of qualifying service may retire giving notice of not less than three months in writing to the appropriate authority".

8. In G.O. Ms. No. 761, Public (Services-A) dated 19th March, 1973, Government decided to constitute the Review Committees for the State and the Subordinate Services and the procedure to be followed in the scrutiny and implementation of the recommendation relation to compulsory retirement. Paragraphs 3 and 4 of this Government Order which are relevant for our purpose may usefully be extracted:

> "3. The Government direct that to start with, cases of Government servants who will complete 25 years of qualifying service or who will attain the age of 50 years between 1st January, 1973 and 31st December, 1973 shall be sent up to the Review Committee so as to reach it by 1st April, 1973.
>
> 4. The Government also direct that cases coming up for retirement during the first half year of any year shall be sent up for review before the 1st July of the previous year. The cases of persons who are due for review in the second half of any year shall be sent before the 1st January of the year".

Clauses VI and VII relating to the procedure to be followed for review of cases found in Annexure II to the said G.O. are also extracted below as they have a bearing on the question to be considered:

"VI. In respect of Government servants whose services are placed on foreign service or on deputation, the recommendations of the borrowing Governments or bodies concerned may be got before putting up their cases before the Review Committee if they attain the age of 50 years or complete 25 years of qualifying service at the time of review.

VII. Once it is decided to retain an officer beyond the age of 50 years he should be allowed to continue upto the normal age of retirement *viz.*, 55 years, without any fresh review unless this is justified for any exceptional reasons, such as his subsequent work or conduct or the state of his physical health which may necessitate his earlier retirement".

The other clauses in Annexure II relate to the grounds on which the cases may be referred to the Review Committee for consideration. Periodically there are certain amendments relating to these grounds and since they have no bearing on the case under consideration, they need not be noted here. One other Government Order which has to be noted is G.O. Ms. No. 775 Personal and Administrative Reforms (Per. R) dated 4th July, 1978. In this Government Order, it was provided that the cases of all Government servants and those of Public Sector Undertakings, autonomous bodies etc., should be reviewed for a second time when they attain the age of 53 years. It was further provided that when the entire service record of an officer is considered at the time of review, no officer should ordinarily be retired on the ground of inefficiency if his service during the preceding five years or where he has been promoted to a higher post during the period of these five years of his service in the higher post, has been found satisfactory.

9. Rule 2 of the Fundamental Rules enables the State Government, in relation to service under their administrative control to make rules modifying or replacing any of the Fundamental Rules. The Fundamental Rules which were framed originally under section 96 (*b*) of the Government of India Act, 1919 and later coming under Article 313 of the Constitution of India, have statutory force and as such rule 56 (*d*) is a statutory rule. The power of the Government to make Fundamental Rule 56 (*d*) was questioned in this writ petition along with other writ petitions and in the judgment of the Division Bench dated 13th October, 1977 which was referred to earlier, it was held to be valid.

10. G.O. Ms. No. 761 Public (Services-A) dated 19th March, 1973 above referred to and the subsequent Government order relating to the procedure to be followed for review of cases of Government servants for compulsory retirement are guidelines and instructions intended to fill up the gaps in the rules and to ensure the uniformity of operation and equitable treatment in all cases of premature retirement under rule 56 (*d*). The rule itself does not contain any guidelines, direction or criteria and the instructions issued by the Government are intended to furnish a uniform procedure in the application of the rule. The Supreme Court had to consider similar instructions issued under rule 16 (3) of the All India Services (Death-*cum*-Retirement Benefits) Rules, 1958 in the decision reported in *State of Uttar Pradesh* v. *Chandra Mohan*[1]. While holding that those instructions are valid and permissible and binding on the Government, the Supreme Court observed:

"It is not necessary to go into this aspect in detail in this case as to whether the instructions can be elevated to the status of statutory rules or even constitutional directions as found by the learned single Judge. It is sufficient for our purpose that these instructions do not violate any provision of the Act or of the Rules. Rule 16 (3), being a rigorous rule *viv-a-vis* a Government servant not himself willing to retire under rule 16 (2), has to be invoked in a fair and reasonable manner. Since rule 16 (3), itself does not contain any guidelines, directions or criteria, the instructions issued by the Government furnish an essential and salutary procedure for the purpose of securing uniformity in application of the rule. These instructions really fill up the yawning gaps in the provisions and

1. (1978) 1 Lab.L.J. 6: (1977) 4 S.C.C. 345: (1977) 3 All.L.R. 673: (1978) 1 S.C.R. 621: A.I.R. 1977 S.C. 2411.

are embedded in the conditions of service. These are binding on the Government and cannot be violated to the prejudice of the Government servant".

In another passage, the Supreme Court again stated:

"Rule 16 (3) must needs to be safeguarded by reasonable procedural guidelines in order that there may be no scope for arbitrariness or discrimination. That is how rule 16 (3), being silent, instructions speak and do vitiative service in vacuous field. The material procedure under the instructions, as if inter-woven in rule 16 (3), can on no account be held invalid or impermissible".

There could therefore be no doubt that these instructions have to be followed by the Government in the matter of compulsory retirement of Government servants.

11. As pointed out by the Supreme Court, compulsory retirement under the Rule is a salutary safeguard in the armoury of the Government for maintenance of the services in trim and fitness. The rule is a constant reminder to the slacker, the sluggish and the inefficient, not to speak of those who may be dishonest or unscrupulous by reputation beyond redemption. While purity of administration is certainly to be desired, the security and morale of the service have also to be maintained. The procedure prescribed in the said Government orders being intended to be guidelines, directions or criteria to be followed in the matter of compulsory retirement they have to be strictly complied with and should not be violated.

12. On the scope of the instructions, as already stated, the contention of the learned counsel for the petitioner is that the petitioner's case should have been referred to the Review Committee before the first of July, 1973 as she had attained the age of 50 years on 14th February, 1974 and since that was not done in this case, the order of compulsory retirement had contravened the binding guidelines and therefore invalid.

13. Paragraph 4 of G.O. Ms. No. 761, dated 19th March, 1973, which has been extracted above, requires that cases coming up for retirement during the first half of any year shall be sent up for review before the 1st July of the previous year and those who are retiring in the second half of any year shall be sent before the 1st January of that year. That means, at least six months before the person attains the age of 50 years his case must be referred to the Review Committee for consideration. Paragraph 3 of the said Government Order dealt with persons who attain the age of 50 years between 1st January, 1973 and 31st December, 1973. Since the Government Order itself was made on 19th March, 1973, it could not have been possible for the Review Committee to comply with the directions of the Government in paragraph 4 and therefore a special provision was made as that contained in paragraph 3 enabling the Review Committee to consider all the cases by 1st April, 1973. These directions, in my opinion, clearly show that a case of Government servant for compulsory retirement should be referred to the Review Committee, six months before he attains the age of 50 years and he or she shall be retired on attaining the age or 50 years. In fact the recommendation of the Santhanam Committee on Prevention of Corruption was "to review the cases of all Gazetted Officers who are *due to complete* 25 years of qualifying service *or to attain* 50 years of age during the ensuing year to recommend the names of the officers who are to be compulsorily retired" (italics is mine). This recommendation which was accepted and incorporated as rule 56 (*d*) thus suggests that the first consideration for compulsory retirement should be prior to his attaining the age of 50 years. Under Paragraph VII of Annexure II to G.O. No. 761 (Public Services-A), dated 19th March, 1973 which has also been extracted above, once it is decided to retain an officer beyond the age of 50 years, he should be allowed to continue upto the normal age of retirement, namely 55 years without any fresh review unless it is justified in any exceptional reasons such as his subsequent work or conduct or the state of his physical health which may necessitate his earlier retirement. That was the rationale in my opinion, of the judgment of the Supreme Court above referred to also.

14. Under G.O. Ms. No. 775 (Personal and Administrative Reforms (Per.R), dated 4th July, 1978, the competent authority is enabled

to review the case for a second time when the Government servant attains the age of 53 years. This second Government Order and the extension provided for in Paragraph VIII of Annexure II to G.O. Ms. No. 761 (Public), dated 19th March, 1973 which enables the Government to have a fresh review when there is justification for any exceptional reason such as his subsequent work or conduct or the state of his physical health which may necessitate his earlier retirement, do not in any way affect the legal position or the need to consider the case of every Government servant six months before he attains the age of 50 years. If a case was referred to the Review Committee six months before 50 years and it was decided to retain the officer beyond the age of 50 years, the question of his case being considered subsequent to 50 years on the material available before 50 years does not arise for consideration. But in a case where, as in the petitioner's case, it was not referred to the Review Committee six months before the officer attained the age of 50 years, is it possible for the Government to consider for the first time a review subsequent to the person attaining the age of 50 years? In my opinion, if the case of the Government servant was not referred to the Review Committee, six months before he attained the age of 50 years, it shall be presumed that there was an assessment in favour of further continuance of the person in service beyond the age of 50 years and any review subsequent to the attainment of the age of 50 years shall be considered to be a second review which could only be on the basis of exceptional circumstances referred in paragraph VII of Annexure II or in accordance with G.O. Ms. No. 775 (Personal and Administrative) Reforms, (Per.R.), dated 4th July, 1978 and not otherwise. In fact, in my opinion this is the ratio of the judgment of the Supreme Court in the decision cited already. That case related to an officer belonging to the Indian Administrative Service. Rule 16 (3) of the All India Services (Death-*cum*-Retirement Benefits) Rules, 1958 enabled the Government to require a member of the service who has completed 20 years of qualifying service or who has attained the age of 55 years to retire in the public interest. Later by a notification, the figures and words "55 years" in rule 16 (3) were substituted by the figures and words "50 years". Rules were further amended providing for a second review at the age of 55. It may be mentioned that the normal retirement age of an officer belonging to All-India Service is 58 years. The guidelines issued in pursuance of this rule which are in *pari materia* with paragraph VII of Annexure II of G.O. Ms. No. 761, dated 19th March, 1973, also stated that once it was decided to retain an officer beyond the age of 55 years, he should be allowed to continue up to the age of 58 without any fresh review unless it is to be justified by any exceptional reasons such as subsequent work or conduct or the state of his personal health which may make earlier retirement really desirable. The reason for this is stated to be, in the said guidelines, that the Government felt that in order that an officer who is cleared for continuance at the age of attaining the age of 55 years can settle down to another three years of work with a sense of security and those working under him accept his control and discipline without any reservation and that an annual review between the years of 55 and 58 would not be desirable. In arriving at this view, they have among other factors taken into consideration the fact that at these stages, members of All India Services generally occupy very senior appointments on which particularly such a sense of security about their tenure is desirable in the public interest. Those considerations of the Government of India referred to in the guidelines equally apply to the State Government servants. In fact the Supreme Court pointed out that the principle behind this instruction is that the sword of Damocles must not hang over the officer every six months after he attains the age of 50 years. Rule 16 (3) has now been amended enabling the Government to review the case at the age of 50 and again at the age of 55. With reference to this, the Supreme Court observes:

> "Once a review has taken place and no decision to retire on that review has been ordered by the Central Government, the officer gets a lease in the case of 50 years upto the next barrier at 55 and if he is again at that point, he is free and untrammelled upto 58 which is his usual span of the service career."

This is the normal rule subject always to exceptional circumstances such as disclosure of fresh objectionable grounds with regard to integrity or some other reasonably weighty reason. In the instant case, the case of the petitioner was not considered six months before she attained the age of 50 years as conceded by the learned Advocate-General. It shall, therefore, be presumed that there was nothing at that stage to compulsorily retire the petitioner. The counter-affidavit has not shown and in fact there was not even a plea that there was any exceptional circumstance such as disclosure of fresh objectionable grounds available subsequent to the attaining of 50 years of age, in order to consider the case subsequent to the attaining of the age of 50 years. The impugned Government Order also has not referred to any subsequent work or conduct or the state of her physical health as necessitating the compulsory retirement. In these circumstances the impugned Government Order is clearly violative of the guidelines or the procedure prescribed in the matter of compulsory retirement and therefore invalid.

15. It is not necessary for me to consider the other contentions of the learned counsel for the petitioner on merits including the plea of lack of *bona fides*, as also the contention that the recommendations of the borrowing department namely the Rural Development Department have not been outlined.

16. For the foregoing reasons, W.P. No. 7493 of 1975 is allowed the rule *nisi* is made absolute and G.O. Ms. No. 1674, Education, dated 1st October, 1975 compulsorily retiring the petitioner is set aside and the petitioner shall be deemed to have continued in service from the date of compulsory retirement. She will also be entitled to all the benefits and privileges as if she had continued in service without a break. There will be no order as to costs in both the writ petitions.

R.S. ——— *W.P. No. 7493 of 1975 allowed. W.P. No. 7495 of 1978 dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

A. Amirtharaj .. *Petitioner**

v.

Dr. (Mrs.) K. Inayath Ali .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 19 and 10—Eviction petition for owner's occupation—Earlier petition filed 10 years back dismissed — Present petition whether barred by section 19 — Present petition being on different facts and under changed law, section 19 not a bar.

D.. (Mrs.) *A* filed a petition for eviction under section 10 (3) (*a*) (*i*) (of Act XVIII of 1960) in 1963 on the ground that she was practising and she needed a clinic for her own use and that she was residing in a rented premises. However, Dr. (Mrs.) *A* was not successful both before the Rent Controller as well as before the Appellate Authority. After 10 years, she filed the present petition (H.R.C. No. 1080 of 1973). Her case was that her children had grown up and that she found it difficult to continue in the rented premises. She had also mentioned that her son had become a Doctor and was occupying the downstairs in the rented premises, which made it difficult for her to live with her husband and other members in the upstairs. The tenant raised the only contention that section 19 was a bar to the present petition. Both the Rent Controller and the Appellate Authority held against the tenant. On revision to the High Court,

Held: The authorities below rightly thought that the averments in the second petition were different from the facts as disclosed in the first petition and therefore section 19 would not come into operation. Having regard to the facts and circumstances of this case and the changed law, section 19 was not a bar to the maintainability of the application by the respondent (Dr. (Mrs.) *A*) for eviction. [*Para.* 6.]

*C.R.P. No. 1517 of 1978. *8th March, 1979.*

If the landlord or landlady in the second petition for eviction could not be said to have raised a point which he or she could not have or ought not to have raised earlier because of the prevailing law, the ultimate decision though between the same parties would not operate as a bar under section 19.

[*Para*. 6.]

Case referred to:—

Salam Sahib v. *Lakshmi Ammal*, 1976 T.L. N.J. 478.

Petition under section 25 of the Act XVIII of 1960, as amended by Act XXIII of 1973, praying the High Court to revise the Order of the Court of the Appellate Authority (IV Judge, Court of Small Causes, Madras), dated 10th April, 1978 and made in H.R.A. No. 286 of 1976 (H.R.C. No. 1080 of 1973 on the file of VIII Judge, Court of Small Causes, Madras).

A. Subramania Iyer and *T. T. Shanmugham*, for Petitioner.

N. Sivamani and *S. G. Krishnamurthy*, for Respondent.

The Court delivered the following

JUDGMENT.—No doubt, Mr. Subramania Iyer has raised an interesting question, in his Civil Revison Petition, whether section 19 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, is applicable to the facts of this case. The respondent was a doctor. She was practising and she needed a clinic for her own use but she was residing in a rented premises. Therefore, she filed H.R.C. No. 4843 of 1963 in the Court of the Rent Controller seeking for eviction of the petitioner under section 10 (3) (*a*) (*i*) of the Act as it then stood. The respondent was not successful both before the Rent Controller as well as before the Appellate Authority.

2. The present petition (H.R.C. No. 1080 of 1973) has been filed by the respondent in 1973, about ten years later. Her case was that she was unable to exercise her profession as a doctor and that she was unable to continue in the rented premises along with her husband and children who are grown up and who find it very difficult to continue their occupation in the rented premises. She would also mention an additional factor that her son has become a doctor and that he is occupying the downstairs in the rented premises, which makes it impossible for her in her old age to live with her husband and the other members of the family in the upstairs. On this different state of affairs and facts, she filed the present petition ten years after she lost the earlier petition filed in 1963, in which she had asked the portion in the occupation of the petitioner for her own use and occupation.

3. The only contention raised by the petitioner-tenant both before the Rent Controller and the Appellate Authority was a legal contention. That legal contention was that under section 19, any application filed under section 10, amongst others, shall be summarily rejected by the Authorised Officer or the Controller, as the case may be, if such application raises between the same parties substantially the same issues as having been finally decided or purported to have been finally decided in a former proceeding under the Act.

4. Both the Rent Controller and the Appellate Authority held against the tenant. Hence the civil revision petition.

5. Mr. Subramania Iyer repeats the legal contention and urges that the earlier order made in 1963 would operate as a bar to the maintainability of the present petition for eviction. The argument, in the first instance, is undoubtedly attractive. But, as on the date when the earlier application was disposed of, the law was slightly different. It would enable a landlord or landlady to apply, in the case of a residential building, for eviction of the tenant if the landlord or his own independent occupation. The Authorition if he or she is not occupying a residential building of his or her own in the city, town or village. But, by an *Explanation* added by Tamil Nadu Act XXIII of 1973 (which was, indeed, the result of the decisions of this Court), the alteration made to the section would enable a landlord or landlady to seek for such eviction not only for his or

her own occupation, but also for the occupation of any member of his or her family, if he or she or any member of the family is not occupying a residential building of his or her own in the city, town or village. This change in law apparently prompted the respondent to come up with the present petition for eviction. Though, of course, this was not the main sheet-anchor of the respondent, yet, it appears to me that by reason of the change of law, certain vested rights which have come into existence for the first time could be availed of and taken advantage of by the landlord or landlady if he or she fits in with the facts and circumstances which he or she has to establish under the modified section.

6. I have already referred to the present petition in which the respondent, after referring to the growth of her family after the previous petition, stated that she being in a rented premises, needs her own premises in the occupation of the petitioner not only for her own occupation but also for the members of her family who do not own any house of their own. She has also incidentally mentioned about the requirement of her son, who, by the time the second petition (the present petition) was filed became a doctor himself and needed a residential portion for his own independent occupation. The Authorities below rightly thought that the averments in the second petition are different from the facts as disclosed in the first petition and therefore section 19 would not come into operation. As already stated by me, the principle of *res judicata* is based on the well-known doctrine that what all might and ought to have been raised on an earlier occasion when a *lis* is on, ought to have been urged by the party who comes to Court, and if he or she fails to do so, he or she will not be allowed to raise that question which he or she might or ought to have raised earlier. This is the basic principle on which the doctrine of *res judicata* rests. If so, under section 19, it should be held that if the landlord or landlady in the second petition could not be said to have raised a point which he or she could not have or ought not to have raised earlier because of the prevailing law, then, the ultimate decision, though between the same parties, would not operate as a bar under section 19. In a case reported in *Salam Sahib* v. *Lakshmi Ammal*[1], Ramanujam, J., took a similar view. Though the facts in that case are not quite clear, yet, it appears to me that the learned Judge was of the view that if the subsequent application is for a purpose different from that on which the earlier petition was based, then, notwithstanding the dismissal of the earlier application, the second petition is maintainable, even though section 19 might apparently present an interdict in such cases. I agree with Ramanujam, J., and having regard to the facts and circumstances of this case and the changed law, I feel that section 19 is not a bar to the maintainability of the application by the respondent for eviction. The Authorities below rightly allowed her application. I accept the *bona fides* of the petitioner because of the reason stated above and for the reasons mentioned in the citation.

7. The civil revision petition, therefore, fails and is dismissed. The petitioner is granted six months' time to vacate.

S.J. ——— *Petition dismissed.*

1. 1976 T.L.N.J. 478.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

Commissioner of Income-tax, Madras and others

.. *Appellants**

v.

M. Ramalingam and another

.. *Respondents.*

(A) *Limitation Act (XXXVI of* 1963), *Articles* 58 *and* 113—*Wrong date of birth entered in service records—Prayer to Authorities for correction of entry—Rejection of prayer—Suit for declaration of correct date of birth and for mandatory injunction to correct records—Article of limitation applicable — Cause of action, when arises.*

(B) *Civil Procedure Code (V of* 1908), *section* 80—*Notice under, whether gives rise to a fresh cause of action.*

The plaintiff sued for a declaration of his correct date of birth as 10th January, 1922 and for the further relief to have the date of birth corrected in the service records to permit him to continue in service till 10th January, 1980. The Birth Register extract showed the date as 13th January, 1922 and the entry in his S.S.L.C. register as 15th June, 1920. The plaintiff claimed that these entries were due to wrong information given, and that on the death of his father in 1959 he saw the horoscope note book maintained by his father and found for the first time that his real date of birth was 10th January, 1922, that thereafter on the basis of the entry in the horoscope he sought alteration of his date of birth in the service records before the statutory authorities, and that on 16th October, 1962 the President passed an order (Exhibit A-9) rejecting his memorial and denying the relief sought. A notice under section 80, Civil Procedure Code, was issued on 1st May, 1975 and the present suit was brought on 24th July, 1975 treating the notice as affording a fresh cause of action. Two questions formulated at the time of admission of the second appeal in the High Court were: (1) whether the suit instituted on the foot that a fresh cause of action arose on the date when the notice under section 80, Civil Procedure Code, was given was right or whether the cause of action was *de die in diem* and whether the present suit need not take cognisance of the rejection order (Exhibit A-9) made as early as 1962; and (2) whether the suit was barred by limitation.

Held: The firm case of the plaintiff that having failed before the statutory authorities he realised that Courts alone were competent to rectify the "innocent and apparent mistake" as to his date of birth and therefore he issued a notice under section 80, Civil Procedure Code, showed that the suit was brought mainly to get over the order passed in 1962 rejecting his prayer for altering his date of birth. Having sought for relief which he could not get under Exhibit A-9, there can be no question of his taking up the stand that the action taken in 1962 need not be taken cognisance of in the present proceedings. It would not be open to him to plead that the cause of action arose only after the suit had been decreed by the trial Court and the S.S.L.C. book was corrected. At the time the suit was brought there was no question of his resting his claim on such a cause of action, *i.e.*, the corrected entry because when the suit was filed the S.S.L.C. book contained only the original entry. The suit could have been brought only on the basis of what was found in 1959 in the horoscope.

[*Paras.* 9 *and* 15.]

Nor can the section 80, Civil Procedure Code, notice give rise to a fresh cause of action.

[*Para.* 15.]

The right to sue accrued on 16th October, 1962 and the present suit ought to have been laid within three years from that date under Article 113, Limitation Act. Even if for any reason Article 58 could be held to be applicable, it will make no difference because the starting point in the present case will be the same and the period within which the suit is to be filed being only three years, the suit filed in 1975 will be barred by limitation.

[*Para.* 12.]

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*S.A.No. 1149 of 1978. 20*th October,* 1978.

Cases referred to:—

V. G. Raw v. *South Eastern Railway*, (1969) Lab.I.C. 1017; *Mohd. Yunus* v. *Syed Unnissa*, (1962) 1 S.C.J. 449: (1962) 1 An.W.R. (S.C.) 162: (1962) 1 M.L.J. (S.C.) 162: (1962) 1 S.C.R. 67: A.I.R. 1961 S.C. 808; *Mst. Rukhmabai* v. *Lala Laxminarayan*, (1960) 2 S. C. R. 253: 1960 S.C.J. 433: A.I.R. 1960 S.C. 335; *Amar Chand* v. *Union of India*, (1973) 2 S.C.R. 684: A.I.R. 1973 S.C. 313; *State of Assam* v. *D. P. Deka*, A.I.R. 1971 S. C. 1973.

Appeal against the decree of the City Civil Court, Madras (I Additional Judge) in Appeal Suit No. 372 of 1977, preferred against the decree of the City Civil Court (II Assistant Judge), Madras in Original Suit No. 5124 of 1975.

A. N. Rangaswami, *Nalini Chidambaram* and *C. V. Rajan*, for Appellants.

B. T. Seshadri, for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal was admitted on two substantial questions of law which have been framed as follows:

> "1. Whether the suit instituted on the foot that a fresh cause of action arose on the date when the notice under section 80, Civil Procedure Code, was given is right or whether the cause of action is *de die in diem* and whether the presently instituted action need not take cognizance of the rejection order made by the authorities under Exhibit A-9 as early as in 1962.
>
> 2. Whether the suit is barred by limitation."

2. Let us take the second point as the main point since, if the suit is barred by limitation then the other aspects do not come up for consideration. The first defendant surprisingly had not taken up the plea of limitation in the written statement and therefore, the trial Court did not frame any issue regarding limitation. After the appeal was filed, C.M. P. No. 86-A of 1978 was filed for raising the additional ground regarding limitation and therefore the Lower Appellate Court had considered the aspect of limitation as point No. 5 and came to the conclusion that the suit has been laid without any laches on the part of the plaintiff. The Lower Appellate Court had approached this point by relying on Exhibit A-10, the suit notice issued by the plaintiff under section 80, Civil Procedure Code, and the reply sent by the second defendant under Exhibit A-14, dated 21st June, 1975. The 1st defendant who is the appellant herein, had not even cared to reply to section 80, Civil Procedure Code, notice. In the view of the Lower Appellate Court, the cause of action arose only after the issue of section 80, Civil Procedure Code notice. But it had not referred to any of the decisions of this Court or those of the Supreme Court for arriving at this conclusion. It does not even state on what ground the notice issued under section 80, Civil Procedure Code can give rise to a cause of action. If the issue of such a notice is to be the starting point for the commencement of the period of limitation, then there being no bar, the issue of repeated section 80, Civil Procedure Code, notice a party coming to Court can, on his own volition, decide about the starting point of limitation and then institute the suit. It is ununderstandable as to how the Lower Appellate Court could have taken the issue of section 80, Civil Procedure Code, notice, as the starting point for computing limitation. It does not even refer to the relevant Article in the Limitation Act which would be applicable to this case, except to refer to the contention of the appellant that the suit is barred by limitation under Article 58 of the Limitation Act or Article 113 of the said Act. Even the counsel appearing in this matter, did not consider it worth while to take the time of this Court to support the conclusion arrived at by the Lower Appellate Court which on the face of it, is perverse. Therefore the only ground that has been relied upon for computing the period of limitation having failed it has to be seen whether the suit that has been filed by the first respondent herein is within the period of limitation, as contemplated under the Limitation Act or not.

3. The counsel for the appellant would state that the suit itself being one for declaration, it will have to come, either under Article 58 or Article 113 of the Limitation Act, and not

under any other Articles. The period of limitation is only three years under both the Articles. The only difference between the two Articles is as follows:

Article 58.—The starting point for limitation will be "when the right to sue *first* accrues".

Article 113.—It will be "when the right to sue accrues".

It is therefore contended that in this matter, the starting point for limitation will be the date when the President of India under Exhibit A-9 rejected the memorial filed by the petitioner on 16th October, 1962, and therefore the suit which was filed on 24th July, 1975, is clearly barred by limitation. His further contention is that, under the statutory rules the first respondent cannot on the eve of his retirement seek to have his date of birth altered, and it is only the competent authority constituted under the Rules, who can take the final decision, and in this matter such a decision having been arrived at as early as 1962, the first respondent cannot by filing the present suit ask, for a mandatory direction for changing the date of birth in the records of the appellant, merely because the second defendant had corrected the Secondary School Leaving Certificate Book, consequent to the decree passed by the trial Court.

4. The counsel for the first respondent contends that the suit is filed for a declaration of correct date of birth and for a further relief to have the date of birth corrected in the records of the appellant by a mandatory injunction, and therefore under the facts and circumstances of this case, the starting point for computing the period of limitation will be only after the entry relating to the date of birth in the S.S.L.C. Book is corrected, and not from the date when the order under Exhibit A-9 was made by the President of India. He forcefully pleads that in this case, there could be no question of computing the period of limitation, because at any time a citizen of this country can file a suit for declaration in a civil Court about his date of birth, which is precisely what the first respondent has asked for in paragraph 9 (A) of the plaint. If such relief is granted, nothing prevents him from asking for a consequential relief for altering the date of birth in the records of the appellant, which should contain only the correct date of birth and not any other wrong entry. He emphasises the fact that his client is not concerned with the order made under Exhibit A-9 and the mandatory injunction asked for is only to enforce what is presently found in the S.S.L.C. Book and not to the original entry which was found therein before the trial Court decreed the suit, and therefore the cause of action arose only after the S.S.L.C. Book was corrected and in this view, the suit is filed well within time. Whatever his client was agitating earlier was based on a different cause of action and based on the original entries in the S.S.L.C. Book, and what is presently agitated in the suit is for changing the entry in the S.S.L.C. Book and that, once such a change is effected the appellant is bound to enter the correct date of birth in the service register, and it cannot be different from what is found in the S.S.L.C. Book.

5. To appreciate the respective contentions, it will be relevant to briefly deal with the circumstances which led to the filing of the present suit. The 1st respondent claims that he was born on 10th January, 1922 and not on the date entered in Exhibit A-2. On the basis of the entry found in the S.S.L.C. Book, the relevent entries in his service register were made when he joined the Defence Department and later on the Income-tax Department. It was claimed by him that it was after his father's death on 16th March, 1959, when he had gone to his native place for conducting the obsequies ceremonies, he chanced to come across the horoscope book maintained by his father and at that time he realised that his correct date of birth is 10th January, 1922 and not 15th June, 1920 as entered in the Service records maintained by the appellant. Therefore he promptly took steps to address the concerned authorities to have the entries corrected. He filed Exhibit A-6, a copy of the petition which was rejected under Exhibit A-7. Thereafter he filed Exhibit A-8 on 26th June, 1962, to the President of India and it was rejected under Exhibit A-9 on 16th October, 1962. Thereafter he issued section 80, Civil Procedure

Code notice under Exhibit A-10 on 1st May, 1975 and filed the suit on 24th July, 1975. In the plaint, it was pleaded that though he was born on 10th January, 1922, the person who informed the concerned authorities for making entries in the birth extract (Birth Register) had erroneously furnished it as 13th January, 1922, and therefore the entry found in the birth register extract, Exhibit A-1 cannot be acted upon. He further pleads that his father was an illiterate person and he had not intentionally given a wrong information to the school authorities for benefiting him in any manner either for the completion of his S.S.L.C. or for any other purpose. Therefore the genuine mistake deserves to be corrected.

6. The appellant in the written statement had taken up the stand that the first defendant is bound by the Rules and Regulations covering his service conditions, and once the date of birth is entered, it cannot be corrected except for clerical mistakes and that too just at the time on the eve of his retirement.

7. The contention of the appellant is that in this case, Article 113 of the Limitation Act will be applicable, because the suit is filed not only for a bare declaration, but also for a consequential mandatory injunction. Article 113 of the Limitation Act is the residuary Article and the period of limitation is prescribed as three years, which would begin from the date when the right to sue accrues. This Article will apply to declaratory suits not falling within any of the Articles 56, 57 and 58 and 108 of the Limitation Act, which specifically provide for certain classes of declaratory suits. Article 58 of the Limitation Act will apply only to a suit which is for a "declaration simpliciter", and not to a suit in which other reliefs are also asked for. It cannot be said that the first respondent is resting content with getting a bare declaration, as prayed for in paragraph 9 (*a*) of the plaint. He also seeks correction of the date of birth in the S.S.L.C. Book for which he has impleaded the second respondent, and also to change the date of birth in the registers of the appellant, and to continue him in service till the date of superannuation *i.e.*, 10th January, 1980. It is therefore contended that when the first respondent failed to get any remedy by invoking the statutory procedure, the right to sue has accrued in him soon after the order was made under Exhibit A-9, and this suit should have been filed within 3 years from that date. Yet another contention taken is, the cause of action is the same which he had pleaded before the Departmental Authorities, and what he has failed to get from the Departmental Authorities, is now sought to be secured by filing the present suit.

8. As already stated, the counsel for the first respondent had pleaded, that there could be no period of limitation, and even if a period is to be computed, in could be only from the date when the S.S.L.C. certificate had been corrected by the second respondent herein and what is now sought for is only to have a mandatory injunction on the basis of the correct entry and it has no relevance to the original entry which alone was agitated before the Departmental Authorities.

9. Therefore the essential aspect which is to be looked at, is to find out what was the cause of action that was agitated in the suit, and what was sought to be achieved by asking for mandatory injunction as against the appellant. This could be appreciated and understood only by relying on the plaint and the evidence tendered by the plaintiff. In the plaint in paragraph 5, after referring to the rejection of the petition filed by the first respondent to the President of India, it is stated as follows:

> "They categorically say that it is too late to do anything in the matter. The plaintiff has waited for a long time that justice will be meted out to him by his department but finding that it would not be had and that Courts alone are competent to rectify this innocent and apparent mistake the plaintiff issued notices under section 80, Civil Procedure Code to his Department. ...."

In the cause of action paragraph, he states that the cause of action arose in 1959 when the plaintiff looked into old records left by his father, the old horoscope book in particular and on and from 1960 onwards when he went on submiting petitions to the authorities concerned and subsequently also. In paragraph 9 he had asked for a mandatory injunction by way of suitable directions to

the Central Government and the Director of School Education, Madras to alter his date of birth to 10th January, 1922 and permit him to continue in service till 10th January, 1980.

In his deposition, he had stated as follows:

"I have filed the suit for declaration of my age."

"I have *also* prayed for a direction to the Government to alter my age."

"I have exhausted all my remedies by sending applications to the authorities. *Only* thereafter I have come to this Court." Therefore this is not a case where he seeks for a bare declaration about his date of birth as contended by the first respondent's counsel and which any citizen can at any time move a civil Court for a bare declaration about his date of birth. But, when he asks for a consequential mandatory injunction with reference to the date of birth, it is then to be seen whether the cause of action to sue had already arisen or not. It is here that the first respondent's counsel pleads that in this case, there is no scope for computing the period of limitation, because it can arise only after the S.S.L.C. Book is corrected. But this contention cannot be accepted, because the firm case of the plaintiff is that, having failed before the statutory authorities, he realised "that Courts alone are competent to rectify this innocent and apparent mistake," and therefore he issued a notice under section 80, Civil Procedure Code. This categorical admission in the plaint shows that the suit has been instituted mainly for getting over the order passed under Exhibit A-9. He had not asked for setting aside the said order. But he himself states that the cause of action arose in 1959, and "on and from 1960 onwards when he went on submitting petitions to the authorities concerned". I have already referred to his evidence wherein he had stated that he has been agitating this matter from 1959 and after exhausting all his remedies, only thereafter he has come to this Court. Therefore his right to sue for altering the date of birth is traced by him to the order of rejection made in Exhibit A-9 and to the earlier orders passed by his Department. Having thus framed his plaint, it is not open to him at this stage to plead that the cause of action arose only after the suit was decreed by the trial Court and the S.S.L.C. Book was corrected by the second respondent herein. It should not be forgotten that the second respondent herein also had refused to correct the entries at his request, and the S.S.L.C. Book was corrected only after the suit was decreed. Hence, at the time when the suit was filed on 24th July, 1975, there was no question of his resting his claim on such a cause of action, *i.e.*, corrected entry. It could have been only on the basis of what is found in Exhibit A-3, the horoscope.

10. The counsel for the first respondent on this point contends that the original entry, whenever corrected, the appellant is then bound to carry out the consequential corrections in the service register or service records. His contention is based on the fact that the original entry in the service records was made only on the basis of the S.S.L.C. Book, and as soon as the S.S.L.C. Book is corrected, the first respondent will be entitled to a mandatory injunction, as prayed for.

11. Here again the fallacy which I have referred to above, sets in, because when he filed the suit, the S.S.L.C. Book contained only the original entry. Secondly the corrected entry cannot be taken as the basic factor, because it only carries the date of birth which is found in Exhibit A-3, the horoscope, which according to the plaintiff shows the correct date of birth. Rather what would be relevant, will only be the correct date of birth, and what is found in the S.S.L.C. Book is only a consequential, entry, which is acted upon by authorities for purposes of convenience. The suit is decreed, not on the basis of the S.S.L.C. Book, but on proof of the correct date of birth, on the strength of the entries found in Exhibit A-3. Therefore, if at all a contention is to be raised that the basic document should be acted upon, it could only be referable to Exhibit A-3 and not to Exhibit A-2, the S.S.L.C. Book, as now corrected.

12. The next question is whether the cause of action arose only after the S.S.L.C. Book is corrected and subsequent to the decree having been passed by the trial Court. The plaintiff himself in unmistakable terms has pleaded that the cause of action had arisen even as early as 1959 and thereafter in 1960 onwards when the authorities reject-

ed his petitions and it is only thereafter that he had instituted the suit realising that Courts alone can rectify the mistake. In this matter, the cause of action is based, according to the plaintiff, as soon as he chanced to come across Exhibit A-3 horoscope book for the first time in 1959, soon after the death of his father. Here again, it will be noticed that he had come across this horoscope book even at the time of his marriage and well before he had entered the service. He admits in his evidence that "I had seen my horoscope at the time of my marriage, but I did not at all notice the difference in age. Courts below have come to the conclusion that at the time of marriage only the planetary positions must have been looked at and therefore the explanation offered by the first respondent is acceptable. While admitting the second appeal, the learned Chief Justice had stated that "I may also note that the findings being concurrent findings of fact are not challenged, nor can they be challenged in second appeal". Therefore I am not going into the question of assessing his evidence and whether the Courts below were correct in accepting his contention in spite of the admission made by him that even at the time of his marriage he had seen the horoscope book. Yet it is the case of the 1st respondent himself that in 1959 he had seen the horoscope book and it is on the basis of Exhibit A-3, he had asked for alteration of date of birth before the statutory authorities, and it is only on that basic document, he had instituted the suit. As could be seen, the birth extract Exhibit A-1 should have been normally acted upon. But according to the plaintiff, here again there was a wrong entry. He does not want to rely on Exhibit A-1, but rests upon Exhibit A-3, and which has been acted upon by the Courts below, as a genuine document. Therefore the basic document can be only Exhibit A-3 and what is found therein is sought to be incorporated in Exhibit A-2, the S.S.L.C. Book, which would only be a consequential entry. Hence I reject the contention of the counsel of the first respondent, that the corrected entry in the S.S.L.C. Book should be taken as a basic document. In this suit, his entire claim is based on Exhibit A-3 and on his oral evidence. Therefore the cause of action for the purpose of suing for the relief of declaration arises as soon as his request before the statutory authorities was rejected. It is needless to repeat the relevant extract in the plaint wherein he had himself stated that after realising that the Courts alone are competent to rectify this innocent and apparent mistake, he issued a notice under section 80, Civil Procedure Code, to his Department and the second respondent herein. Hence, his right to sue accrued as on 16th October, 1962, and the present suit ought to have been laid within three years from that date under Article 113 of the Limitation Act. Even if for any reason, it has to be taken that Article 58 will be applicable, it can make no difference because the starting point in this case will be the same and the period within which the suit is to be filed being only three years, the suit filed in 1975 is barred by limitation.

13. The first respondent's counsel contended that there can be no period of limitation for a suit of this nature and even if it is so, the period can start only from the date after the S.S.L.C. Book entry was corrected. No other Articles of Limitation Act was referred to before me to plead that the suit is well within the period of limitation.

14. Hence, it is clear that the first respondent had pleaded in the plaint that the cause of action is nothing different from what he had failed to get before the Departmental Authorities, and it is to rectify the date of birth found in the records of the appellant, and which was refused to be corrected, he had instituted the suit not only for a mandatory injunction for correcting the date of birth, but also to permit him to continue in service till 10th January, 1980 and therefore the right to institute the suit arose as soon as the order under Exhibit A-9 was passed on 16th October, 1962 and the suit filed after nearly 13 years on 24th July, 1975, is hopelessly barred by limitation under Article 113 of the Limitation Act.

15. Since on the aspect of limitation it has been found that the suit is barred by limitation, it is not necessary to go into the other aspects of the matter and the second appeal itself having been admitted only on two substantial questions of law, I do not think it necessary to deal with any other point. For the purpose of completion, I proceed to consi-

der the other point which incidentally touches upon the aspect of limitation. The lower Appellate Court has held that the period of limitation will start when section 80, Civil Procedure Code, notice was issued. I have already held that the Appellate Court had not rested its conclusion on the basis of any established decision and the counsel appearing before me does not even consider it worthwhile to rest upon the conclusion arrived at by the lower Appellate Court. On the other aspect as to whether the presently instituted action need not have taken cognizance of the rejection order made under Exhibit A-9, I have held, for the reasons above stated, under the point relating to limitation that, since the first respondent in the plaint and in his deposition had sought for relief which he could not get under Exhibit A-9, there can be no question of the first respondent now taking up the stand that the action taken in 1962 need not be taken cognizance in this proceeding. Hence, on this point as well, it has to be held that section 80, Civil Procedure Code, notice issued on 1st May, 1975 cannot give rise to a fresh cause of action and that the first respondent by instituting the present suit, has sought to make the order passed under Exhibit A-9 ineffective and therefore it is relevant for the purpose of the present proceedings.

16. During the course of lengthy hearings, counsel for the appellant had referred to the relevant statutory rules and regulations and also about the finality of the decision arrived at by the statutory auhorities regarding alteration of the date of birth and that a civil servant cannot seek a revision of the date of birth just at or about the time of his superannuation.

17. The learned counsel for the first respondent relies upon the decision rendered in *V. G. Ray* v. *South Eastern Railway*[1], and pleads that the appellant having been made a party to the proceedings, irrespective of whatever may be provided under the Service Rules, the appellant is bound by a decree of a civil Court and must carry out consequential changes in the service records. In the said decision, which arose under Article 226 of the Constitution of India, it was held that since the Railway Board was not made a party, it cannot be compelled to alter the date of birth. It has been observed therein that if the Railway had been made a party defendant, the respondents would have been bound, under the general law, to give effect to the inter-partes judgment, irrespective of what was provided for in the Service Rules. Based on this observation it is contended that the appellant and the second respondent having been impleaded as parties to the proceedings, the first respondent can ask for revision of the date of birth even though the Service Rules may not approve of an alteration being effected at this distance of time. In view of the finding given by me that the suit is barred by limitation, it is not necessary to deal with the scope of the Rules which are referred to in the judgment of the Court below and as to whether a civil Court can issue a mandatory direction for alteration of the date of birth or to the following decisions cited by him. *Mohd. Yunus* v. *Syed Unnissa*[1]; *Mst. Rukhmabai* v. *Lala Laxminarayanan*[2]; *Amar Chand* v. *Union of India*[3]; *State of Assam* v. *D. P. Deka*[4].

18. In the result, the second appeal is allowed. The decrees and judgments of the Lower Appellate Court and that of the Trial Court are set aside and the suit is dismissed as barred by limitation. No costs.

R.S. ——— *Appeal dismissed.*

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1. 1969 Lab. I.C. 1017.

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1. (1962) 1 S.C.J. 449: (1962) 1 An.W.R. (S.C.) 162: (1962) 1 S.C.R. 67: A.I.R. 1960 S.C. 808.
2. 1960 S.C.J. 433 : (1960) 2 S.C.R. 253 : A.I.R. 1960 S.C. 335.
3. (1973) 2 S.C.R. 684: A.I.R. 1973 S.C. 313.
4. A.I.R. 1971 S.C. 1973.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and S. Mohan, JJ.*

V. Bichawa .. *Petitioner**

v.

M. Venkatesan .. *Respondent.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), section 10 (8)—Scope and applicability—Applicable not only to eviction under section 10 but also to eviction under section 14 of the Act.*

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), section 2 (b)—"Landlord" — Definition — Property purchased benami in the name of wife—Husband acting as general agent of wife—Petition for eviction filed without consent of wife by husband—Whether maintainable.*

The petitioner herein filed a petition against the respondent before the Court of Small Causes, Madras, for eviction of the respondent under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, on the ground that the petitioner herein required the premises for the immediate purpose of demolition and reconstruction. The respondent resisted the petition putting forward the contention that the requirement of the petitioner was not *bona fide*. The Rent Controller, while finding that the requirement of the petitioner was *bona fide* held that though the property was purchased benami in the name of his wife the petition was maintainable and directed eviction of the respondent. Against the order of the Rent Controller the respondent herein preferred an appeal to the Appellate Authority. The Appellate Authority while confirming the conclusion of the Rent Controller that the requirement of the petitioner was *bona fide* allowed the appeal and dismissed the petition filed by the petitioner herein on the sole ground that the petitioner was only an agent of the owner of the property and consequently he could not maintain the petition without the previous written consent of the owner, as required under section 10 (8) of the Act. The result was that the petition filed by the petitioner herein under section 14 (1) (*b*) of the Act for eviction of the respondent was dismissed. On revision to the High Court,

Held: Section 10 (8) of the Act will apply to eviction under section 10 as well as section 14 of the Act. Section 10 (8) does not use the expression "eviction under this section". Further, section 10 (8) is a part of section 10 and section 10 (1) takes in not only eviction under section 10 but also eviction under sections 14 to 16. Consequently merely as a matter of construction it has to be concluded that the applicability of section 10 (8) is not confined or restricted only to eviction under section 10, but it will extend also to eviction under sections 14 to 16. The definition of tenant takes in a number of persons who may have a very tenuous connection with the property. Obtaining eviction of a tenant in the occupation of a building has got serious consequences both for the tenant as well as the landlord and in such a context, if the Legislature had taken the view that where a person who applies to the Rent Controller for eviction of a tenant is not really the owner of the building, but happens to be a person appointed by the owner merely for the purpose of collecting the rent, such a person must obtain the previous consent of the landlord for taking proceedings for eviction of the tenant, it cannot be said that such a provision is not a reasonable one. A person who is appointed merely for the purpose of collecting the rent as an agent of the landlord may take into his head to apply for eviction of the tenant of the premises in question, whether under section 10 or section 14 of the Act and take the consequences flowing therefrom. By applying section 10 (8) to eviction under section 14 no prejudice will be caused to the landlord for the simple reason that, if a person appointed only for the purpose of collecting the rent from the tenant files a petition for eviction under section 14 without reference to the owner of the building, it may produce very serious consequences. That section contemplates the landlord taking all

* C.R.P. No. 883 of 1978. *24th July, 1979.*

necessary steps for the purpose of immediately demolishing the building and reconstructing the same within the period prescribed under the statute and giving an undertaking to the Court also to such an effect. If a person, who was appointed only for the purpose of collecting rents, did all things and ultimately it was found that they were not binding on the landlord namely, the owner of the building, the tenant who had been evicted from the property would be put to serious inconvenience and the landlord himself would not be obliged to honour the commitments made by the agent on his behalf. Under these circumstances, if the Legislature had thought fit to provide for the agent, obtaining, the previous consent of the landlord, it could not be said that such a provision made by the Legislature was unreasonable. Consequently both as a matter of construction and as a matter of commonsense it has to be concluded that the provisions of section 10 (8) apply not merely to eviction under section 10 of the Act but also to eviction under section 14. Having regard to the object of the provision, section 10 (8) of the Act applies only to a person who has been appointed as an agent only for the purpose of collecting the rent from the building and will not take in other types of agents of the landlord, who may be empowered by the landlord himself to take proceedings for eviction also. Consequently, the class of persons contemplated by section 10 (8) of the Act is a very limited class and only with reference to that class, the requirement of obtaining the previous written consent of the landlord for filing a petition for eviction will apply.

The petitioner in this case will not fall within the scope of section 10 (8) of the Act requiring him to obtain the previous written consent of his wife for the purpose of filing a petition for eviction, with the result that the petition for eviction filed by the petitioner herein cannot be said to be not maintainable by virtue of the provisions contained in section 10 (8) of the Act. [*Paras.* 12, 13, 16.]

Cases referred to:—

Shanmugha Appah v. *Abdul Hameed*, (1973) 1 M.L.J. 241: 86 L.W. 103: A.I.R. 1974 Mad. 133; *Syed Ibrahim* v. *Sudarsanam*, (1972) T.L.N.J. 259; *Pahalajmal Khatumal* v. *K. Govindarajulu, Power-of-Attorney Agent of T. V. and Brothers*, (1961) 1 M.L.J. 150; *D. Seshagiri Rao* v. *M. V. Sastry*, (1970) 1 An.W.R. 348.

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act, Tamil Nadu Act XVIII of 1960 as amended by Tamil Nadu Act XXIII of 1973 praying the High Court to revise the Judgment and order of the Court of the IV Judge, (Appellate Authority), Court of Small Causes, Madras, dated 20th March, 1978 and made in H.R.A. No. 471 of 1977 (H.R.C. No. 1023 of 1976 VII Judge (Rent Controller) Court of Small Causes, Madras).

This petition came on for hearing before *Ramaprasada Rao, CJ.*

The Court made the following

ORDER*.—In *Shanmugha Appah* v. *Abdul Hameed*[1], Kailasam, J. (as he then was), took the view that, though persons, who receive rent on their own account or on behalf of any other person or on behalf of themselves or others, may in a sense be receiving rent on behalf of others as agents, that class of persons is not excluded under section 10 (8) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. In another case, *Syed Ibrahim* v. *Sudarsanam and others*[2], the same learned Judge expressed as follows:

> "Section 10 (8) provides that the landlord who is receiving or is entitled to receive the rent of a building merely as an agent of the landlord shall not be entitled to apply for eviction of a tenant without the previous written consent of the landlord ...... Section 19 (1) specifically provides that there could be no eviction except in accordance with the provisions of sections 10 and 14 to 16. Therefore, the eviction metioned in section 10 (8) cannot be confined to evictions under section 10 alone, but also to evictions under sections 14 to 16."

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* 11th January, 1979.

1. (1973) 1 M.L.J. 241: 86 L.W. 103: A I R. 1974 Mad 133.
2. (1972) T.L.N.J. 259.

2. In the instant case what has been brought out on record appears to be that the petitioner has to be classified as a person who was receiving rent on behalf of another, and though, in a sense, he might be called an agent, that class of persons, according to the decisions in *Shanmugha Appah* v. *Abdul Hameed*[1], is not excluded under section 10 (8) of the Act. Again it is doubtful whether the *non obstante* clause in section 10 (8) would also be applicable to applications filed under sections 14 to 16 of the Act. The argument of learned counsel for the respondent is that, as section 10 (1) provides that there could be no eviction except in accordance with the provisions of sections 14 to 16 of the Act, the impact of section 10 (8) should also be visited on applications under sections 14 to 16 of the Act. I am unable to agree with this contention of learned counsel for the respondent. But, as there is the judgment of a single Judge of this Court, the matter should be referred to a Division Bench for a final decision. Post accordingly.

K. Srinivasan and *K. Raghunathan,* for Petitioner.

Kurian Arumugan and *Joseph,* for Respondent.

The Order of the Court was pronounced by

Ismail, J.—This Civil Revision Petition under the Tamil Nadu Act XVIII of 1960 comes before this Bench on a reference made by the Hon'ble the Chief Justice.

4. When the matter came before the Hon'ble the Chief Justice originally, reliance was placed on a decision of Kailasam, J., as he then was in *K. Shanmugha Appa* v. *S. S. Abul Homeed*[1], as well as on an unreported judgment of the same learned Judge in C. R.P. Nos. 7, 100 and 101 of 1971 and C.M.P. Nos. 11248 and 11809 of 1971 *(M. S. Syed Ibrahim* v. *M. K. Sudarsanam and others)*[2], judgment, dated 21st March, 1972. The learned Chief Justice was not inclined to agree with the contention of the learned counsel for the respondent in the civil revision petition, based on the said judgments and hence the reference to this Court.

5. Before we proceed to deal with the question of law, on the basis of which this civil revision petition has been referred to a Bench, we shall refer to the facts of this case. The petitioner herein filed a petition. H.R.C. No. 1023 of 1976, against the respondent herein before the Court of Small Causes, Madras, for eviction of the respondent under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, Tamil Nadu Act XVIII of 1960, hereinafter referred to as the Act, on the ground that the petitioner herein required the premises for the immediate purpose of demolition and reconstruction. The respondent herein resisted the petition putting forward the contention that the requirement of the petitioner was not *bona fide*. However, during the course of the hearing of the petition, he produced Exhibit R-6, a registration copy of the sale deed under which the property in question was purchased for the purpose of putting forward the contention that the petitioner herein was not the owner of the premises and, if at all, he could only be an agent of the owner, and that consequently he had no right to maintain the present petition. The Rent Controller, while finding that the requirement of the petitioner was *bona fide* held that the evidence of P.W. 1, that the petition-property was purchased benami in the name of his wife remained unchallenged. He also referred to the evidence of the respondent himself that he did not make any enquiry with regard to the fact as to who was the real owner of the petitioner-building, that he took the lease of the petitioner-building only from the petitioner and that he was paying the rent to the petitioner. In view of this, the Rent Controller held that the petition was maintainable and therefore directed the eviction of the respondent herein.

6. Against the order of the Rent Controller, the respondent, herein preferred an appeal to the appellate authority. The appellate authority, while concurring with the conclusion of the Rent Controller that the requirement of the petitioner was *bona fide*, allowed the appeal and dismissed the petition filed by the petitioner herein on the sole ground that the petitioner herein was only an agent of the owner of the property and con-

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1. (1973) 1 M.L.J. 241: 86 L.W. 103: A.I.R. 1974 Mad. 133.
2. (1972) T.L.N.J. 259.

sequently he could not have maintained the petition without the previous written consent of the owner, as required under section 10 (8) of the Act. For the purpose of coming to this conclusion, he relied on the decision of Kailasam, J., as he then was, in *M. S. Syed Ibrahim* v. *M. K. Sudarsanam and others*[1], to which we have already made reference. The result was that the petition filed by the petitioner herein under section 14 (1) (*b*) of the Act for eviction of the respondent was dismissed. It was to revise the order of the appellate authority that the petitioner filed the above civil revision petition.

7. When the civil revision petition came up for hearing before the Hon'ble the Chief Justice, the respondent sought to sustain the order of the appellate authority with reference to the decision of Kailasam, J., as he then was, referred to already. The learned Chief Justice disagreed with the view of Kailasam, J., as he then was, and hence directed the above civil revision petition to be posted before a Bench.

8. Section 2 (6) of the Act defines the expression, "Landlord" as follows:

"'Landlord' includes the person who is receving or is entitled to receive the rent of a building, whether on his own account or on behalf of another or on behalf of himself and others or as an agent, trustee, executor, administrator, receiver or guardian or who would so receive the rent or be entitled to receive the rent, if the building were let to a tenant:

Explanation.—A tenant who sub-lets shall be deemed to be a landlord within the meaning of this Act in relation to the sub-tenant."

Section 10 (1) of the Act states:

"A tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or sections 14 to 16."

There are two provisos to this sub-section, which it is unnecessary to refer to for the purpose of this case. It is worthwhile pointing out that even the heading of this section is "Eviction of Tenants". Section 10 (8) of the Act states:

"Notwithstanding anything contained in this section no person who is receiving or is entitled to receive the rent of a building merely as an agent of the landlord shall, except with the previous written consent of the landlord, be entitled to apply for the eviction of a tenant."

9. As we have seen section 10 (1) of the Act refers to eviction under section 10 as well as sections 14 to 16. Section 14 deals with eviction of a tenant by a landlord for repairs or for reconstruction, sections 15 and 16 are consequential sections and as far as the present case is concerned, we have seen that the petition filed by the petitioner for eviction of the tenant was under section 14 (1) (*b*) of the Act. The question that came to be considered by Kailasam, J., as he then was, was whether the provisions of section 10 (8) of the Act applied to eviction under section 10 only or whether they applied to evictions under sections 14 to 16 also. The learned Judge took the view that section 10 (8) applied to evictions not only under section 10, but also under sections 14 to 16.

10. The first decision of Kailasam, J., as he then was, was the unreported decision in *M. S. Syed Ibrahim* v. *M. K. Sudarsanam and others*[1]. In that case the petitions filed by the petitioners for eviction of the tenants were held to be not maintainable on the ground that as contemplated in section 10 (8) of the Act the previous written consent of the landlord had not been produced. The argument that was advanced before the learned Judge was that section 10 (8) was applicable only to eviction under section 10 and not to eviction under section 14 of the Act for the reason that section 14 contemplated the Rent Controller passing an order directing the tenant to deliver possession of the building to the landlord and did not use the expression, "eviction". But the learned Judge repelled that contention by pointing out that section 10 (1) itself used the expression 'eviction' under sections 14 to 16

1. (1972) T.L.N.J. 259.

1. (1972) T.L.N.J. 259.

and that there was no substance in the distinction sought to be made between section 10 and section 14 on the basis of the language used in section 14, with the result the learned Judge held that section 10 (8) applied to eviction not only under section 10 but also under section 14.

11. The next decision of Kailasam, J., as he then was was in *K. Shanmugha Appah* v. *S. S. Abdul Hameed*[1]. In that decision also the learned Judge had to consider the scope of section 2 (6) as well as section 10 (8) of the Act. As far as the facts of that case was concerned, the defence of the tenant was that the petitioner was not entitled to maintain the petition as he was one of the joint co-owners. The learned Judge, while holding that section 10 (8) would apply to an eviction under section 14 also, took the view that, as far as the case with which he was concerned, the landlord did not fall within the category covered by section 10 (8) and that therefore the previous written consent was not mandatory.

12. Consequently we have now to consider the question whether section 10 (8) applied to eviction under section 10 only or it applied to eviction under section 14 also. We are of the opinion that section 10 (8) will apply to eviction under section 10 as well as section 14 of the Act. In the first place, section 10 (8) does not use the expression, "Eviction under this section". Secondly, section 10 (8) is a part of section 10 and section 10 (1) takes in not only eviction under section 10 but also eviction under sections 14 to 16. Consequently merely as a matter of construction, we come to the conclusion that the applicability of section 10 (8) is not confined or restricted only to eviction under section 10, but it will extend to eviction under sections 14 to 16 also.

13. Having come to this conclusion simply as a matter of construction of the language in the section, we are also of the opinion that there is nothing on principle to exclude the applicability of section 10 (8) to eviction under section 14. We have already seen the wide definition of the term 'landlord' as contained in section 2 (6) of the Act. That definition takes in a number of persons who may have a very tenuous connection with the property. Obtaining an eviction of a tenant in the occupation of a building has got serious consequences both for the tenant as well as the landlord and in such a context, if the Legislature had taken the view that where a person who applies to the Rent Controller for eviction of a tenant, is not really the owner of the building, but happens to be a person appointed by the owner merely for the purpose of collecting the rent, such person must obtain the previous written consent of the landlord for taking proceedings for eviction of the tenant, it cannot be said that such a provision is not a reasonable one. A person who is appointed merely for the purpose of collecting the rent as an agent of the landlord may take into his head to apply for eviction of the tenant of the premises in question, whether under section 10 or section 14 of the Act and take the consequences flowing therefrom. There being no controversy that section 10 (8) applies to eviction under section 10, we shall consider whether by applying section 10 (8) to eviction under section 14, any prejudice is caused to the landlord at all. We are of the opinion that no prejudice will be caused to the landlord for the simple reason that if a person appointed only for the purpose of collecting the rent from the tenant files a petition for eviction under section 14 without reference to the owner of the building, it may produce very serious consequences. That section contemplates the landlord taking all the necessary steps for the purpose of immediately demolishing the building and reconstructing the same within the period prescribed in the statute and giving an undertaking to the Court also to such an effect. If a person, who was appointed only for the purpose of collecting the rents, did all these things and ultimately it was found that they were not binding on the landlord namely, the owner of the building, the tenant who had been evicted from the property would be put to serious inconvenience and the landlord himself would not be obliged to honour the commitments made by the agent on his behalf. Under these circumstances, if the Legislature had thought fit to provide for

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1. (1973) 1 M.L.J. 241: 86 L.W. 103: A.I.R. 1974 Mad. 133.

the agent obtaining the previous written consent of the landlord, it could not be said that such a provision made by the Legislature was an unreasonable one. Consequently both as a matter of construction as well as a matter of common sense we come to the conclusion that the provisions of section 10 (8) apply not only to eviction under section 10 but also to eviction under section 14 of the Act.

14. Thus, we agree with the view taken by Kailasam, J., as he then was.

15. The next question for consideration is, whether the dismissal of the petitioner's petition for eviction on the ground that the requirements of section 10 (8) have not been complied with is correct or not. That will depend on the scope of section 10 (8) itself. We have already extracted both section 2 (6) as well as section 10 (8). Kailasam, J., as he then was had repeatedly pointed out in the two decisions referred to already that out of several classes of persons who would come within the scope of section 2 (6) as 'landlord', only a specified class had been mentioned in section 10 (8) and it was that class which was required to obtain the previous written consent of the landlord before a petition for eviction could be maintained. The question when that arises for consideration is, which is that class which is covered by section 10 (8).

16. There is a decision of a single Judge of this Court on the class of persons covered by section 7 (7) of the Tamil Nadu Buildings (Lease and Rent Control) Act (XXV of 1979), corresponding to section 10 (8) of the Act. That provision was:—

> "Notwithstanding anything contained in this section, no person who is receiving or is entitled to receive the rent of a building merely as an agent of the landlord shall, except with the previous written consent of the landlord, be entitled to apply for the eviction of a tenant".

Thus, it will be seen that section 10 (8) of the Act is identical with section 7 (7) of the Tamil Nadu Act (XXV of 1949). With reference to that section, Srinivasan, J., in *Pahalajmal Khatumal* v. *K. Govindarajulu, Power of Attorney agent of T. V. & Bros. and another*[1], stated as follows:—

> "The plain purport of the section appears to be nothing more than that no person who is collecting the rent or is entitled to collect the rent of the premises on behalf of the landlord and whose power in that connection is limited only to such collection of rent shall be entitled to take any steps for the eviction of the tenant except with the previous consent of the landlord. The expression 'merely as an agent of the landlord' has necessarily to be read along with the earlier clause 'who is receiving or is entitled to receive the rent'. 'Merely', therefore, qualified the extent of the power of the agent, and where such power is limited only to receiving the rent or to be entitled to receive the rent, such an agent cannot apply for the eviction of the tenant unless he is armed with the further power in the shape of previous written consent of the landlord. This, to my mind, is the proper interpretation to be placed on this section. It does not mean, as argued on behalf of the petitioner, that notwithstanding that the agent holds a general power which specifically includes the power to take steps in eviction proceedings on behalf of the landlord, even then, there should be a separate written consent for that purpose".

This view of the learned single Judge of this Court has been followed by a single Judge of the High Court of Andhra Pradesh in *D. Seshagiri Rao* v. *M. V. Sastry*[2]. Before the High Court of Andhra Pradesh it was contended that the word "merely" used in section 10 (8) of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act (XV of 1960), corresponding to section 10 (8) of the Act was to distinguish an agent from other persons who were included in the definition of 'landlord' and that the said sub-section could not be interpreted to mean that it was applicable only to an agent who was authorised only to receive the rent or who was entitled to receive the

1. (1961) 1 M.L.J. 150.
2. (1970) 1 An.W.R. 348.

rent. While rejecting the argument, the Andhra Pradesh High Court followed the Judgment of Srinivasan, J., referred to above. We are of the opinion that the view taken by Srinivasan, J., is the correct view as to the scope of section 10 (8) of the Act and any other view will lead to the position that even when a person holds a general power-of-attorney from the owner of a building and is empowered to take all proceedings which the owner or landlord can take, he should still obtain the previous written consent of the landlord for the purpose of filing a petition for eviction as contemplated by section 10 (8) of the Act. Having regard to the object of the provision, we are of the opinion that the Legislature could not have contemplated any such situation and that section 10 (8) of the Act applies only to a person who has been appointed as an agent only for the purpose of collecting the rent from the building and will not take in the other types of agents of the landlord, who may be empowered by the landlord himself to take proceedings for eviction also. Consequently the class of persons contemplated by section 10 (8) of the Act is a very limited class and only with reference to that class, the requirement of obtaining the previous written consent of the landlord for filing a petition for eviction will apply.

17. Against the background of this construction of section 10 (8), we have now to see, whether the petitioner in this case will fall within the scope of section 10 (8) or not. As we have pointed out already, the Rent Controller recorded a finding in his order that the case of P.W. 1 that the petition-property was purchased benami in the name of his wife remained unchallenged. Consequently, it is clear that it was the husband who was acting on behalf of the wife, with reference to the property belonging to the wife, and was letting out the property as well as collecting the rent from the tenants. In such a context, the petitioner herein was not an agent solely for the purpose of collecting the rent for the building in question, but he is a general agent of the wife as it happens generally in our country, having regard to the customs and habits of the people. Therefore the petitioner in the present case will not fall within the scope of section 10 (8) of the Act requiring him to obtain the previous written consent of his wife for the purpose of filing the petition for eviction, with the result the petition for eviction filed by the petitioner herein cannot be said to be not maintainable, by virtue of the provisions contained in section 10 (8) of the Act. We have already referred to the fact that both the Rent Controller as well as the Appellate Authority have concurrently held that the requirement of the petitioner was *bona fide*.

18. Under these circumstances, the civil revision petition is allowed and the order of the Appellate Authority will stand set aside and that of the Rent Controller will stand restored. Time to vacate and deliver vacant possession—One month. There will be no order as to costs.

R.S. ——— *Civil revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

S. M. A. Abdul Rasheed .. *Appellant**

v.

A. M. A. Abdul Batcha and others .. *Respondents.*

Tamil Nadu Agriculturists Relief Act (IV of 1938), section 19 as amended by Act (VIII of 1973)—Usufructuary mortgage and lease-back arrangement—Suit for arrears for rent decreed—Applications to scale down decree amount and amend decree as fully satisfied—Amount being due under rent deed no scope for deeming such rent as "interest".

The predecessors-in-interest of the appellant herein had on 1st January, 1943 usufructuarily mortgaged the property concerned and obtained a lease-back arrangement of the mortgaged property in and by which the mortgagor had agreed to pay a monthly rent of Rs. 35 to the mortgagee and continued to be in possession of the suit property as a tenant. Later on both the original parties had died. Since the mortgagor did not pay the rents, proceedings were initiated in the Rent Control Court for evicting the tenant. During pendency of the proceedings in the High Court an order was passed on 10th August, 1955 directing the tenant to deposit into Court all arrears of rent within 3 months and for future rents which were to be regularly paid security was to be furnished. Accordingly security was furnished. To realise the amount due covered by the security a suit was filed and it was decreed. The matter was taken up on appeal and further on second appeal by the aggrieved mortgagor and ultimately the appeal failed and it was dismissed. It was after the passing of the Amending Act VIII of 1973, that the application was filed to wipe out the amount covered by the decree on the basis that it was nothing but "interest".

Held, that the amount was payable under a rent deed and there was no scope for deeming such rents as interest because the amount due was covered by an independent transaction which had no relationship with the mortgage transaction. On the date when the appellant filed the application under section 19 of the Act, he was not in the position of a mortgagor. If it had to be contended that in the period during which the amount was payable, he was in the position of a mortgagor, there again, the High Court had expressed the view that the one and the only occasion when he can invoke the sub-section would be, when he comes by way of a redemption suit. Therefore not only because the amount decreed was covered by a separate transaction, but on the date when he filed the application or even on the date when the decree was obtained against him he was not a mortgagor, he cannot invoke section 9-A. Section 9-A of the Act can become applicable only when there was an usufructuary mortgage and it was because of the special provisions contained therein, that the High Court in a catena of decisions had held that section 9-A being a Code by itself, any relief claimed therein by a mortgagor can be secured only in a suit for redemption. [*Para.* 11.]

The amount covered by the decree being only rental amount, which is an independent transaction, the appellant cannot seek the benefits under section 9-A of Act IV of 1938, as amended by Act VIII of 1973. [*Para.* 12.]

Cases referred to:—

Kamakshi Ammal v. *Pappathi* (alias) *Kamalambal,* (1976) 2 M.L.J. 60: 89 L.W. 124: I.L.R. (1976) 2 Mad. 145: A.I.R. 1976 Mad. 292; *Upagara Marie Andire* v. *Samraj,* (1978) 2 M.L.J. 517: 91 L.W. 476; *Somu Achari* v. *Singara Achari,* (1945) 2 M. L. J. 17: A. I. R. 1945 Mad. 407; *Kalyanasundaram* v. *Chockalingam,* (1951) 2 M.L.J. 459: 64 L.W. 920: A.I.R. 1952 Mad. 293; *Gopal Chettiar* v. *Arumugha Naicker,* (1962) 1 M.L.J. 4; *Nataraja Iyer* v. *Subbiah Ambalam,* (1962) 1 M.L.J. 397; *Visalakshi Achi* v. *Nayslagu,* (1955) 68 L.W. 630; *Muthuswamy Odayar* v. *Savarimuthu Odayar,* (1963) 1 M.L.J. 171: 76 L.W. 63: I.L.R. (1963) Mad. 274: A.I.R. 1963 Mad. 249 (F.B.); *Easoop* v. *Rookutty*

* A.A.A.O. No. 47 of 1977. *27th April,* 1979.

Umma, (1956) 1 M.L.J. 427: A.I.R. 1956 Mad. 259; *Srinivasa Raghava Ayyangar* v. *Narasimha Mudaliar,* (1951) 2 M.L.J. 589: 65 L. W. 32: A. I. R. 1952 Mad. 292; *Sankara Ayyar* v. *Yagrappan Servai,* (1940) 2 M.L.J. 874: 52 L.W. 830: A.I.R. 1941 Mad. 193; *Venkatanarayana Rao* v. *C. Savansukha,* (1954) 2 M.L.J. 47: I.L.R. (1954) Mad. 1231: 67 L.W. 344: A.I.R. 1954 Mad. 896; *Karuppan Chettiar* v. *Vaithyanathan,* (1955) 2 M.L.J. 30: (1955) 68 L.W. 477.

Appeal against the Order of the District Court, East Thanjavur at Nagapattinam dated 12th February, 1977 and made in C.M.A. No. 62 of 1976 (I.A. No. 1700 of 1974 in O.S. No. 291 of 1961, D.M.C., Tiruvarur).

T. R. Venkataraman, for Appellant.

M. R. Venkataraman, for Respondents Nos. 1 to 5.

R. Sundaralingam, for Respondents Nos. 6 to 17.

The Court made the following

ORDER.—This appeal is preferred against the order made in C.M.A. No. 62 of 1976 by the District Court, East Thanjavur, which in turn confirmed the order made by the District Munsif, Tiruvarur in I.A. No. 1700 of 1974 in O.S. No. 291 of 1961. I.A. No. 1700 of 1974 was filed under section 19 of Tamil Nadu Act IV of 1938, as amended by Act VIII of 1973, to scale down the decree amount and amend the decree in O.S. No. 291 of 1961, as fully satisfied. It was claimed by the petitioners that they are agriculturists entitled to the benefit of the said Act and that their father, who is since dead, had mortgaged the property described in the plaint and obtained a lease-back arrangement by which he had agreed to pay the rent of Rs. 35 per month and continued to be in possession of the suit property as a tenant. Abdul Hajid Rowther, who is the predecessor-in-interest of the appellant herein who was the second petitioner in the petition, usufructuarily mortgaged the suit property in favour of one Syed Bivi Ammal on 1st January, 1943, and later on both the parties had died. During the subsistence of the mortgage, there was a lease-back arrangement of the mortgaged property, in and by which the mortgagor had agreed to pay a monthly rent of Rs. 35 and continued to be in possession of the suit property as a tenant. Since the mortgagor did not pay the rents, proceedings were instituted in the Rent Control Courts for evicting the tenants. Later on, a suit in O.S. No. 291 of 1961 was filed in the District Munsif's Court, Tiruvarur, for realisation of the rents due, and it was decreed. The matter was taken up on appeal and further in Second Appeal No. 785 of 1965 by the aggrieved mortgagors and ultimately the appeal failed and it was dismissed. During the pendency of the proceedings in this Court, C.R.P. No. 603 of 1955 was filed as against the R. C. O. P. proceedings taken against the mortgagors. An order was passed on 10th August, 1955 directing the petitioners before it to deposit into the Court all arrears of rent due from March, 1951 onwards upto 10th August, 1955, within three months from that date, and that the future rents should be regularly paid, for which they should furnish security to the satisfaction of the Court. Accordingly they gave security. It is to realise the amount covered by the security that O.S. No. 291 of 1961 was filed, and as stated above, the second appeal preferred in S.A. No. 785 of 1965 was also dismissed. It is after the passing of the amended Act VIII of 1973, that the present application has been filed to wipe out the amount covered by the decree on the basis that it was nothing but 'interest' which had accused before 1st March, 1972 even though the amount was paid as rent.

2. The respondents herein contended that it is true that there was a mortgage in favour of Syed Bivi Ammal in 1943 and the suit was filed by the mortgagee to realise the mortgage amount and the amount covered by the decree in O.S. No. 291 of 1961 being the security, it cannot be scaled down by invoking section 9-A (9) (*a*) (*i*) of the Act at this stage, when the mortgagor has not filed a suit for redemption. It was further claimed that there being no mortgage in existence as on date, the entire decree amount cannot be wiped out and the contention that even though the amount payable was covered by a rent deed, in fact, it is only interest, and therefore, it is liable to be scaled

down, cannot be entertained because the mortgage transaction was completed as early as 1961.

3. The District Munsif, Tiruvarur, held on the basis of Exhibit A-1, which is a certified copy of the registered rent deed executed by the father of the petitioners in favour of the mortgagee Syed Bivi Ammal, that the amount covered by the decree is in the form of a security bond for Rs. 1,600 and the mortgaged property having been redeemed, the decree which is now in existence, has nothing to do with the mortgage and it having been held that section 9-A is a Code by itself, there can be no question of construing the amount covered by the decree as interest which would lead to the entire amount being wiped out because of Act VIII of 1973. It therefore held that the respondents before it would not be entitled to any interest over the amount decreed before 1st March, 1972 and that the principal amount of Rs. 1,600 with interest at 5½% per annum from 1st March, 1972 is realisable. On appeal, this decision was confirmed by holding that section 9-A being a Code by itself, there could be no question of construing the rent' payable under the lease-back arrangement, as 'interest'.

4. Counsel for the appellant contends that, after the passing of Act VIII of 1973, under section 19 (1) of the Act, the appellant is entitled to derive the benefits for amending the decree by invoking the provisions of the Act, which in turn would result in taking the benefits under section 9-A (9) (*a*) (i) of the Act. He claims that the amount which became payable under the decree, even though called 'rent', in essence it was nothing but 'interest' and, therefore, after the passing of Act VIII of 1973, all the interest payable under the mortgage, preceding 1st March, 1972 deserve to be wiped out, and since the decree is still subsisting, the appellant is entitled to ask for amendment of the decree under section 19 (1) of the Act, as it stands now.

5. This contention is opposed by the counsel for the respondent Mr. Ram Mohan on the grounds that: (1) the mortgage is not existing as on date to invoke section 9-A (9) (*a*) (i) (hereinafter to be referred to as such section'); (2) what is now being enforced, is the security bond that was given in C.R.P. No. 603 of 1955 and not the rental amount; (3) even assuming that it is 'rent', since the relationship between the parties in respect of the amounts now realised was one of 'landlord' and 'tenant' covered by Exhibit A-1, the rental deed, it can never be construed as 'interest' payable under the mortgage; (4) the mortgagor having not filed a suit for redemption, he cannot invoke section 9-A of the Act since this Court has, in more than one decision, held that it is a code by itself, and in the present proceedings, after the mortgage has been extinguished, the said sub-section cannot be invoked.

6. It is not in dispute that the appellant is an agriculturist within the scope of Tamil Nadu Act IV of 1938. Equally it is not in dispute that "the decree was obtained after the mortgaged property was redeemed on the security bond executed by the petitioners for rent due". This happened in 1961 subsequent to the mortgagee filing a suit for the mortgage amount. Therefore even on the date when O.S. No. 291 of 1961 was decreed, the mortgage had ceased to exist. O.S. No. 291 of 1961 was filed only for the rental amount due based on Exhibit A-1, certified copy of the registered rent deed for the period during which the mortgagors were in possession of the property and answerable to the mortgagee. Hence it has to be held in favour of the respondents herein that when the present application was filed under section 19 of the Act, the mortgage transaction dated 1st January, 1943, was not subsisting.

7. The second objection taken is that what is now sought to be enforced is only the security and not the rental amount covered by the decree. For this Mr. Ram Mohan, relies upon the decision rendered in *Kamakshi Ammal* v. *Pappathi* alias *Kamalambal*[1], which arose under Tamil Nadu Cultivating Tenants Protection (Amendment) Act in which the question arose as to what could be the

1. (1976) 2 M.L.J. 60: 89 L.W. 124: I.L.R. (1976) 2 Mad. 145: A.I.R. 1976 Mad. 292.

character of the amount deposited in Court as arrears of rent and whether it could be construed as outstanding within the meaning of section 3 of the Act. It was held therein, that when

"the Legislature has designedly used the expression 'outstanding' (in section 3), it means that if the tenant had already paid in full or in part the rent payable, he had no right to seek for recovery of it from the landlord..............In the instant case, the amount in Court deposit could not be said to be arrears of rent or an outstanding rent. It had lost the impress of rent because of the peculiar situation when the money came to Court pursuant to orders of Court, in an application for stay of the execution of a money decree. Taking all these factors into consideration, I am of the view that the petitioners are entitled to the amount in Court deposit and not the respondents."

Since the Court had directed that arrears of rent be deposited into Court, it has been held that

"after such a payment has been made, it cannot still be treated as an outstanding amount."

Relying upon the observation made therein that because of the peculiar situation, when the money comes into Court pursuant to orders of Court in an application for stay, it loses the impress of rent, it is contended that, in this case, when the security bond was executed pursuant to the orders in C.R.P. No. 603 of 1955, the respondents are no longer claiming any rent or interest, and hence the sub-section cannot be invoked. He also relies upon the decision in *Upagara Marie Andire* v. *Samraj*[1], to the effect, that in a case where the promissory note is executed which represents the recovery of the balance of the amount payable for the sale, the true nature of the transaction, is to be based only on the promissory note and the suit can be filed as such, and there is no question of treating the transaction as one for recovery of balance of consideration. In short, his contention is that there is no need to find out the origin of the transaction, but what is being enforced immediately is alone relevant for consideration.

8. Mr. Venkataraman, counsel for the appellant contends that but for the mortgage transaction, dated 1st January, 1943, Exhibit A-1, the rental deed would not have come into existence and the rental deed itself had been entered into as a lease back arrangement by the mortgagee in favour of the mortgagor and the rental amount cannot be none other than 'interest' payable to the mortgagee and therefore the sub-section would be attracted and hence relief can be claimed after 1st March, 1972. For this purpose, he refers to the decision in *Somu Achari* v. *Singara Achari*[1], to show that in a case where there is a charge of the unpaid vendor for which a promissory note comes into existence, still the charge cannot be put an end to and the filing of a suit on the promissory note and obtaining a decree thereon, will be concerned only to the realisation of the amount covered by that promissory note. In this contest it will be useful to refer to the order passed in S.A. No. 785 of 1965 wherein it has been stated that

"the appellant herein is to deposit into Court all arrears of rent due from March, 1951 onwards upto date, that is, 10th August, 1955 within three months from that date, that is, on or before 10th October, 1955 and should pay regularly future rent or in the alternative the defendants should furnish security to the satisfaction of this Court for all arrears of rent upto date."

"Accordingly the appellants herein gave security. On the failure of the appellants to pay the rent, the respondents instituted a suit on the security for realising the amount of rent due to them. Both the Courts have decreed the suit."

Therefore what was offered as security was in lieu of the 'rent' payable as per Exhibit A-1. No doubt in the second appeal, it was contended that the proper course would have

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1. (1978) 2 M.L.J. 517: 91 L.W. 476.

1. (1945) 2 M.L.J. 17: A.I.R. 1945 Mad. 407.

been to file only a suit for recovery of rent and not on the basis of security and it was held that there is no illegality in the suit having been framed on the security. Even though Mr. Ram Mohan would contend that the Court having held that a suit can be filed on the basis of the security, it cannot bear the impress of rent, in view of the extract above referred to it is quite obvious that the amount that was decreed was nothing but the arrears of rent claimed by the party. The decision reported in *Kamashi Ammal* v. *Papathi* (alias) *Kamalambal*[1], was more concerned with the meaning that should be given to the word 'outstanding' in Tamil Nadu Act XXI of 1972. As observed therein, in the peculiar situation, when the money had come into Court, it could not still bear the same impress of 'the rent' due. Therefore it cannot be said that what was claimed in O.S. No. 291 of 1961 was not rent but was only for enforcement of the security bond furnished during the pendency of the civil revision petition. The nature of claim had continued to remain the same and this has also been recognised in the decision rendered in S.A. No. 285 of 1961, and therefore it has to be held that what was decreed was nothing but 'rent' payable by the mortgagor-tenant in favour of the mortgagee landlord.

9. Mr. Venkataraman, counsel for the appellant contended that since the amount covered by the decree is nothing but arrears of rent, straightaway the sub-section gets applied and by virtue of the recent amendment in Act VIII of 1973, the entire interest prior to 1st March, 1972 being wiped out, the decree amount cannot be realised from the appellant. The sub-section (9) (*a*) (i) of the Act existed even before 1972 and the point as to whether the rent paid under a lease back arrangement by the mortgagor will be interest or only rent had come up for consideration before this Court even as early as 1952, and it was decided in *Kalyanasundaram* v. *Chockalingam*[2], that:

"the *Explanation* to section 9-A (1) (*b*) and sub-section (9) (a) (1) introduces a fiction for the purpose of scaling down the mortgage debt. Under the explanation the mortgagee, though he leased back the mortgaged property, is deemed to be in possession. Under sub-section (9) (*a*) (i) the rent payable by the mortgagor shall be deemed to be the interest on the mortgage debt. Sub-section (9) (*a*) does not expressly or by necessary implication indicate that a lease back is invalid. Indeed some of the provisions show that the lease is valid and continues to be in force. . . . . The scheme of the section leaves no doubt in my mind that it is intended only to apply when the mortgagor seeks to redeem the mortgage. As the lease has not been declared to be invalid, if the mortgagor does not apply for redemption there is nothing in the provisions of this section or in the Act which precludes a mortgagee from filing a suit for recovery of the rents legally due to him under the lease deed. It is no doubt true that the mortgagor can anticipate such a suit and take necessary proceedings for redemption. So long as the mortgagor does not take any such step, the pre-existing rights of parties are intact. In this view I agree with the Court below, that the mortgagee will be entitled to a decree for the entire rent due to him under the lease deed."

This view was followed in *Gopal Chettiar* v. *Arumugha Naicker*[1], wherein it was held that:

" 'Interest' as defined in section 3 (*iii*) of the Madras Agriculturists' Relief Act, is a part of the obligation under the debt. . . . . Payments in discharge of obligations arising under different transactions or contract could not come within the scope of interest as defined. Section 9-A (*a*) (i) of the Act provides specially for cases of lease-back in favour of the mortgagor by the usufructuary mortgagee where the rent due will be deemed to be interest on the mortgage. Payment of rent in such cases will not, except under the deeming provision in section 9-A, tantamount to interest

1. (1976) 2 M.L.J. 60.
2. (1951) 2 M.L.J. 459 : 64 L.W. 920 : A.I.R. 1952 Mad. 293.

1. (1962) 1 M.L.J. 4.

and cannot be scaled down under section 13 of the Act."

Again in *Nataraja Iyer* v. *Subbiah Ambalam*[1], it was held that:

"In a suit by the mortgagee to enforce such a mortgage, the mortgagor could not invoke section 9-A of Madras Act IV of 1938, which is intended to apply only when the mortgagor seeks to redeem the mortgage."

The Division Bench of this Court in *Visalakshi Achi* v. *Nayslagu*[2], while dealing with a case arising under the lease-back to the mortgagor and the claim being in respect of arrears of rent, held that:

"the provisions of section 9 (A) (9) (*a*) for scaling down would be available to a mortgagor-lessee only in cases where he files a suit for redemption, and this apart, the provision is inapplicable to cases where a mortgagee files a suit for the recovery of the rent stipulated under the lease back".

It has been held therein that:

"Section 9-A (9) (*a*) (*i*) is not an independent provision but in the context and setting in which it appears, is designed for the determination of the amount payable on redemption. The lessor will, therefore, be entitled to a decree in that suit for rent, for the full amount of the rent stipulated by the parties under the contract on the ground that the present suit not being one for redemption the scaling down provision would not apply".

In *Muthuswamy Odayar* v. *Savarimuthu Odayar*[3], the Full Bench has held that "the provisions of section 9-A of the Act can be invoked only at the time of the redemption of the mortgage, and that no doubt the sub-section deems rent due as interest, but it cannot mean that the rents that had been already paid should also be deemed to be interest. The word 'due' would mean 'still remains unpaid' and there being nothing in the statute to extend its meaning so as to include really what is not due, the fiction will come into play only when the claim is for redemption". Therefore it is quite obvious that whenever there is a lease-back arrangement and a certain amount of rent becomes payable, it has to be worked out as an independent transaction based on the lease deed or lease arrangement. The lessee claiming to be an agriculturist may seek relief under amended Act VIII of 1973, for wiping out the interest payable under the decree preceding 1st March, 1972. But he cannot ask for the wiping out of the liability to pay the lease amount covered by the suit. This Court had been taking the consistent view, as pointed out above, that section 9-A of the Act is a Code by itself, and that it can be invoked by a mortgagor only if he files a suit for redemption. In this case, the mortgagor-lessee had not filed any suit for redemption. The rent payable by him under Exhibit A-1 can be deemed to be interest by the fiction contemplated under the sub-section if only he can invoke section 9-A of the Act. He being a mortgagor, the decisions above referred to, preclude him from invoking the sub-section, since he had not filed any suit for redemption. This is not a case where subsequent to Act VIII of 1973, a mortgage decree obtained by a mortgagee, is sought to be amended by invoking section 19 of the Act. When he does not have the legal right to invoke section 9-A, he cannot take advantage of the fiction contemplated under the sub-section, merely because the claim is nothing but rent that became payable by the mortgagor on a lease-back arrangement to the mortgagee during the subsistence of a mortgage. This Court in the decisions above referred to, has held that it has to be treated as a separate transaction, and so long as the lease is not held to be invalid, the mortgagor-lessee is bound to satisfy such decrees, unless he comes by way of redemption. In this case, the mortgage transaction had come to an end by 1961, and the decree in O.S. No. 291 of 1961 had been obtained subsequently, representing nothing but the rental amount covered by an independent transaction under Exhibit A-1 and therefore the appellant herein cannot

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1. (1962) 1 M.L.J. 397.
2. (1955) 68 L.W. 630.
3. (1963) 1 M.L.J. 171 : 76 L.W. 63 : I.L.R. 1963 Mad. 274 (Mad.) : A.I.R. 1963 Mad. 249 (F.B.).

claim that the decree amount is only interest payable under the mortgage and covered by the fiction contemplated under the sub-section.

10. On the 4th point, I have already referred to the binding decisions of this Court, wherein it has been held that section 9-A of the Act is a Code by itself and it can only be taken advantage of under the circumstances contemplated therein. Counsel for the appellant refers me to the decision rendered in *Easoop* v. *Rookutty Umma*[1], in which the point arose as to whether an application under section 19-A of the Madras Agriculturists' Relief Act, 1938, to scale down a mortgage debt as per the provisions of section 9-A of that Act, is maintainable, and to get the necessary declaration and it was held that section 19-A of the Act cannot be controlled by section 9-A, since it does not contain any overriding or self-contained provision which can inhibit the procedure contemplated under section 19-A of the Act being enforced. The Court had the occasion to consider the earlier decisions rendered in *Srinivasaraghava Ayyangar* v. *Narasimha Mudaliar*[2]; *Sankara Ayyer* v. *Yagappan Servai*[3] and *Venkatanarayana Rao* v. *C. Savansukha*[4], and held that such decisions will not be of any relevance for considering the question as to whether section 19-A of the Act can be controlled by section 9-A of the Act. It was further held therein that any further remedy which the mortgagor might claim as and by way of recovery of possession or otherwise, could be had only in a suit and not in a proceeding under section 19-A of the Act but by the other modes open to him under law. He also relied upon the decision of this Court in *Karuppan Chettiar* v. *Vaithyanathan*[5], wherein a division bench of this Court considered the scope of sections 9-A and 19-A of the Act and held that the procedure prescribed in section 19-A of the Act is not in any way controlled by section 9-A of the Act.

1. (1956) 1 M.L.J. 427 : A.I.R. 1956 Mad 259.
2. (1951) 2 M.L.J. 589 : 65 L.W. 32 : A.I.R. 1952 Mad. 292.
3. (1940) 2 M.L.J. 874 : 52 L.W. 830 : A.I.R. 1941 Mad. 193.
4. (1954) 2 M.L.J. 47 : I.L.R. (1954) Mad. 1231 : 67 L.W. 344 : A.I.R. 1954 Mad. 896.
5. (1955) 2 M.L.J. 30 ; (1955) 68 L.W. 477.

11. Based on the reasonings adopted in these decisions, the counsel for the appellant contends that it will equally apply in respect of section 19 (*i*) which contemplates amendment of decrees. It will be seen that such a relief will be available by applying the provisions of the Act to decrees passed. Therefore "if the provisions of the Act are to be applied" then it will necessitate invoking the sub-section. It is not in dispute that the appellant is an agriculturist. I have already held that the amount to be recovered from him is the rental amount payable under the Rent Deed Exhibit A-1. There is no scope for deeming such rents as 'interest', because the amount due is covered by an independent transaction which has no relationship with the mortgage transaction. On the date when he files the application under section 19 of the Act, he is not in the position of a mortgagor. If it has to be contended that in the period during which the amount was payable, he was in the position of a mortgagor, there again, it will be seen that this Court had taken the view that the one and the only occasion when he can invoke the sub-section will be, when he comes by way of redemption suit. Therefore not only because the amount that is decreed is covered by a separate transaction, but on the date when he filed the application or even on the date when the decree was obtained against him, he was not a mortgagor and section 9-A of the Act can become applicable only when there is an usufructuary mortgage and it is because of the special provisions contained therein, this Court in a catena of decisions, had held that section 9-A being a Code by itself, any relief claimed therein by a mortgagor can be secured only in a suit for redemption filed by him and appellant can get the relief as prayed for.

12. The amount covered by the decree being only rental amount covered by Exhibit A-1 which is an independent transaction, the appellant cannot seek the benefits under section 9-A, (*a*) (*i*) of Act IV of 1938, as amended by Act VIII of 1973. As held by the Courts below, interest payable on the decree debt upto 1st March, 1972 alone will be scaled down and in this view, the appeal fails and it stands dismissed. No costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ., and S. Natarajan, J.*

Adilatchumy Ammal and another .. *Appellants**

v.

Ramasamy Reddiar .. *Respondent.*

(A) *Will—Construction — Bequest in favour of 'A' and 'K' for life with powers of alienation—Vested remainder to. 'S' — 'S' predeceasing 'K'—Nature of estate taken by 'K' —Substitution* fideicommissaire, *definition of— Exception — 'Wrongful', meaning according to French Law.*

(B) *Code Civil, Articles* 896, 1040 *and* 1041 *—Applicability.*

Substitution *fideicommissaire* has been understood as a disposition by which the first beneficiary is juridically bound by an obligation to conserve during the lifetime the property and to pass on after his death to another beneficiary the subject of the gift or devise on condition that the latter will survive. This is how Article 896 in the Code Civil has been understood by Dalloz, the famous author and interpreter of the French Law. This method of disposition enjoins the first beneficiary to conserve the property during his lifetime. Under Article 896, according to Dalloz, the second beneficiary must be alive on the date of the death of the first beneficiary. Such thing is not present in the present disposition. Articles 1040 and 1041 instead of Article 896 of the French Civil Code would apply to the facts of the present case. This is not a case in which the bequest of *S* is made conditional on the happening of an uncertain event. But on the other hand the intendment of the testator is to suspend the operation of the bequest in favour of *'S'* during the lifetime of *'K'*. Article 1041, therefore, directly applies to the facts of this case. Even in Indian Law under section 119 of the Indian Succession Act the date of vesting of the legacy when possession is postponed is made clear by the language of that section. According to this High Court an interest is said to be vested if it is not subject to any condition precedent, when it is to take effect on the happening of an event which is certain whereas an estate is contingent when the right to own it depends upon happening of an uncertain event which may or may not happen. As there is an interregnum where life-estate is followed by an absolute estate since the absolute estate must vest somewhere, the interpretation of the clause in the will under consideration leads to the only conclusion that by reason of the dispositive clause on the death of the testator the interest vests in *S*. But the right to possession was postponed until after the death of *'K'*. There was an interdict to *'K'* not to alienate the property in any manner. But as she had possessory title to the property that limited right could be dealt with by her but without prejudice to the ultimate beneficiary namely *'S'*. This subject could be approached in a slightly different angle also. What was granted to *'K'* was the right to enjoy the usufruct. Under Article 617 of the Code Civil an usufruct is extinguished by the actual or civil death of the usufructuary. Having regard to this provision in the French Code since the estate had already been vested in *'S'* on the death of the testator, the heirs of *'S'* were entitled to possession of the property on the death of *'K'*, who by reason of the life-estate created in her favour in the first instance was entitled to possess it only till her lifetime. The bequest in favour of *'K'* did not enable her to convey an absolute interest to the first defendant and the right which the first defendant secured was only the bare right of enjoyment over the suit property so long as *'K'* was alive. If it intended to convey any better right to the first defendant, it was void. The plaintiff (heir of *S*) would be entitled to a declaratory decree that he was the owner of the suit property and a consequential direction that the defendants do deliver possession of the suit property. [*Paras.* 4 *and* 5.]

Case referred to:—

Lakshmana Nadar and others v. *R. Ramaier*, 1953 S.C.R. 848: 1953 S.C.J. 420: (1953) 1 M.L.J. 834; A.I.R. 1953 S.C. 304.

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* L.P.A.No. 29 of 1976. *26th July*, 1979.

Appeal under clause 15 of the Letters Patent against the Judgment of Justice Maharajan, dated 31st March, 1975 and made in S.A. No. 548 of 1973 preferred to the High Court against the judgment of the District Court, Pondicherry in A.S. No. 12 of 1972 (O.S. No. 277 of 1968, Additional Sub-Court, Pondicherry).

I. Stanislaus, R. Gopalakrishnan and *S. Mohandas,* for Appellant.

V. Ramakrishnan, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—This Letters Patent Appeal is against the judgment of Maharajan, J. in S.A. No. 548 of 1973 in which he granted leave to appeal against his own judgment. The relevant facts in this appeal are as follows:

2. Admittedly the suit property belonged to one Royalu Reddiar. Under Exhibit A-1, dated 10th April, 1946, Royalu Reddiar disposed of all his properties under a notarial testament. Royalu Reddiar died issueless. Under the will which he made in a French territory he bequeathed the suit property to his sister Kamalammal to be enjoyed by her for the term of her life without any power to mortgage, gift or sell the same. He gave his other properties both moveable and immoveable to his wife Adilakshmi Ammal and again granted a life-estate to her over such properties without any right to alienate them in any manner. After creating such life-estates in favour of his sister and wife, he made the following bequest:

> "After the death of Kamalammal and Adilakshmi Ammal, my aforesaid properties shall belong, in full ownership and with all powers of alienation, to my nephew Sambasiva Reddiar, I also decide that after my death, my business concern shall be run by Sambasiva Reddiar and accounts in respect thereof rendered by him to my wife. The said Sambasiva Reddiar will perform all my funeral ceremonies and those of my wife, Adilakshmi Ammal."

In accordance with the tenor and recitals in the will, Kamalammal took possession of the property in pursuance of the bequest as above. It is common ground that Sambasiva, who is the ultimate beneficiary under the will and the universal legatee therein died sometime after the death of Royalu Reddiar, who died on 26th October, 1946 and the plaintiff is admittedly the heir of Sambasiva as his brother. It appears that on 10th September, 1958, under Exhibit A-2 Kamalammal sold the suit property to the first defendant. Kamalammal died on 17th May, 1967. The plaintiff filed the present suit against the first defendant and also her husband for annulment of the sale deed dated 10th September, 1958, Exhibit A-2. The trial Court dismissed the suit. On appeal the plaintiff was unsuccessful. The plaintiff carried up the matter in second appeal to this Court. Maharajan, J. was of the view that the plaintiff was entitled to a declaration as prayed for and after declaring the plaintiff's title to the suit property directed the defendants to deliver possession of the same to the plaintiff. He however granted leave to appeal under clause 15 of the Letters Patent.

3. The short question that arises for consideration in this case is, whether by virtue of the dispositary clause in the will of Royalu Reddiar a vested interest was created in favour of Sambasiva and whether possession of the property so vested was only postponed, till after the lifetime of Kamalammal. The first Appellate Court was of the view that the provisions of the Transfer of Property Act having been extended to Pondicherry only on 9th January, 1967, the will has to be interpreted according to the Code Civil prevailing in French territories, Maharajan, J., was of the view that the doctrine of substitution *fideicommissaire* was not invocable at all in this case. Applying the well known rule of interpreting a testament by sitting in the arm chair of the testator Maharajan, J., was of the view that the intention of the testator was to create a vested right in favour of Sambasiva and that it would be artificial to affix to Exhibit A-1, the label of substitution *fideicommissaire*. He relied upon a decision of the Supreme Court in *Lakshmana Nadar and others* v. *R. Ramier*[1]. That was a case where the following directions were given in the will of one Lakshminarayana Iyer.

1. 1953 S.C.J. 420 : 1953 S.C.R. 848 : (1953) 1 M.L.J. 834 : A.I.R. 1953 S.C. 304.

"After my lifetime, you the aforesaid Ranganayaki Ammal, my wife, shall till your lifetime, enjoy the aforesaid entire properties......After your lifetime, Ramalakshmi Ammal our daughter and her heirs shall enjoy them with absolute rights and powers of alienation such as gift, exchange and sale from son to grandson and so on for generations."

The Supreme Court while construing the clause made the following observations:

"Considering the will in the light of these principles, it seems to us that Lakshminarayana Iyer intended by his will to direct that his entire properties should be enjoyed by his widow during her lifetime but her interest in these properties should come to an end on her death, that all these properties in their entirety should thereafter be enjoyed as absolute owners by his daughter and the heirs with powers of alienation, gift, exchange and sale from generation to generation. He wished to make his daughter a fresh stock of descent so that her issue, male or female, may have the benefit of his property. They were the real persons whom he earmarked with certainty as the ultimate recipients of dis bounty. In ex-ultimate recipients of his bounty. In express terms he conferred on his daughter change, sale, but in sharp contrast to this, on his widow he conferred no such powers. The directions to her was that she should enjoy the entire properties including the outstandings, etc., and these shall thereafter pass to her daughter. Though no restraint in express terms was put on her powers of alienation in case of necessity, even that limited power was not given to her in express terms. If the testator had before his mind's eye his daughter and her heirs as the ultimate beneficiaries of his bounty that intention could only be achieved by giving to the widow a limited estate, because by conferring a full Hindu widow's estate on her the daughter will only have a mere *spes* which may or may not mature and under the will her interest would only be a contingent one in what was left undisposed of by the widow."

Following the ratio in this case the learned Judge came to the conclusion that the ultimate estate granted to Sambasiva was not a mere *spes successionis* and that the mechanism of the bequest under Exhibit A-1 is radically differedent from that restored to in what is called substitution *fideicommissaire*. He also made it clear as the notarised will did not even use the term substitution *fideicommissaire*, that doctrine cannot be invoked at all, that in accordance with the provisions of the Code Civil, there was only a postponement of the right of enjoyment of the suit property by Sambasiva and there was an immediate vesting of the absolute right in him notwithstanding the intervention of a life estate in favour of Kamalammal. He also considered in detail the distinction between the two doctrines substitution *fideicommissaire* and *nue* properties and after invoking the relevant clause in the Code Civil, he came to the conclusion that the intention of the testator was merely to let Kamalammal to enjoy the usufruct of the property so long as she was alive and to give the ownership of the property *in praesenti* to Sambasiva subject to such a life-estate in favour of Kamalammal. He also finally said that the sale effected by Kamalammal under Exhibit A-2 would enure until the death of Kamalammal and on her death the defendants' rights over the suit property got extinguished and that the plaintiff who is the undisputed heir of Sambasiva became entitled to immediate possession of the suit property. It is as against this, the present appeal has been filed.

4. Substitution *fideicommissaire* has been understood as a disposition by which the first beneficiary is juridically bound by an obligation to conserve during his lifetime the property and to pass on after his death to another beneficiary the subject of the gift or devise on condition that the latter will survive. This is how Article 896 in Code Civil has been understood by Dalloz, the famous author and interpreter of the French Law. This method of disposition enjoins the first beneficiary to conserve the property during his lifetime. Under Article 896, according to Dalloz, the second beneficiary must be alive on the date of the death of the first beneficiary. Such a thing is not present in our disposition. In our view Articles 1040 and 1041 instead of Article 896 of the French Code Civil applies to the facts of this case,

5. Articles 1040 and 1041 of the Code Civil are extracted hereunder for ready reference.

> "1040. All dispositions by will which are made conditional on the happening of an uncertain event, and which the testator does not intend to have effect (vest) until such event happens or does not happen (as the case may be) lapse if the person nominated heir or the person in whose favour they are made dies before the condition has been fulfilled. (C. 900, 1168, 1183).
>
> 1041. A condition that is only intended by the testator to suspend the carrying out of a bequest does not prevent the person made heir or the beneficiary acquiring a vested interest which is transmissible to his heirs (C. 1181, 1185)".

This is not a case in which the bequest of Sambasiva is made conditional on the happening of an uncertain event. But on the other hand the intendment of the testator is to suspend the operation of the bequest in favour of Sambasiva during the lifetime of Kamalammal. Article 1041 therefore, directly applies to the facts of this case. Even in Indian Law under section 119 of the Indian Succession Act the date of vesting of the legacy when possession is postponed is made clear by the language of that section. Section 119 of the Indian Succession Act reads as follows:

> "119. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.
>
> *Explanation.*—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives or from a provision that, if a particular event shall happen, the legacy shall go over to another person?"

The Court had occasion to deal with such a provision and expressed the view that an interest is said to be vested when it is not subject to any condition precedent, when it is to take effect on the happening of an event which is certain whereas an estate is contingent when the right to own it depends upon the happening of an uncertain event which may or may not happen. As there is an interregnum where a life estate is followed by an absolute estate since the absolute estate must vest somewhere, the interpretation of the clause in the will under consideration lends to the only conclusion that by reason of the dispositive clause already excerpted by us, on the death of Royalu Reddiar, the suit property vested in Sambasiva. But the right to possession was postponed until after the death of Kamalammal. There was an interdict to Kamalammal not to alienate the property in any manner. But as she had possessory title to the property that limited right could be dealt with by her but without prejudice to the ultimate beneficiary namely Sambasiva. This would mean that the sale of the property under Exhibit A-2 dated 10th September, 1958 effected by Kamalammal became ineffective for all purposes on her death on 17th May, 1967. The subject could be approached in a slightly different angle also. What was granted to Kamalammal was the right to enjoy the usufruct. Under Article 617 of the Code Civil an usufruct is extinguished by the actual or civil death of the usufructuary. Having regard to this provision in the French Code, we are of the opinion that since the estate has already vested in Sambasiva on the death of the testator, the heirs of Sambasiva are entitled to possession of the property after the death of Kamalammal who by reason of the life estate created in her favour in the first instance, was entitled to possess it only till her lifetime.

6. We agree with the conclusion of Maharajan, J., that the bequest in favour of Kamalammal did not enable her to convey an absolute interest to the first defendant and

the right which the first defendant secured was only the bare right of enjoyment over the suit property so long as Kamalammal was alive. If it intended to convey any better right to the first defendant, it was void, as Kamalammal herself did not have such a conveyable interest. The plaintiff therefore would be entitled to a declaratory decree that he is the owner of the suit property and for a consequential direction that the defendants do deliver possession of the suit property to him.

7. The Letters Patent Appeal therefore, fails and is dismissed. No costs. The defendants are granted three months time to deliver possession of the property.

R.S. —— *Letters Patent Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ. and S. Natarajan, J.*

Kannammal Achi .. *Appellant**

v.

S. Subbalakshmi *alias* **D. Subbalakshmi Ammal** .. *Respondent.*

Tamil Nadu Debt Relief Act (XXXVIII of 1972), sections 6 and 15— Scaling down of mortgage debt — Tamil Nadu Agriculturists' Relief Act (IV of 1938), sections 7 and 8— Scope and applicability.

The respondent as judgment-debtor in a mortgage action sought for scaling down of a mortgage debt which had ripened into a mortgage decree, under section 15 of Act XXXVIII of 1972, under the following circumstances. In 1970 a mortgage was admittedly executed by the respondent in favour of the appellant. The appellant filed a suit in which the respondent *inter alia*, claimed the status of a "debtor" within the meaning of Act XXXVIII of 1972, and, therefore, the incidental and consequential benefits arising thereunder. But before the preliminary decree was passed on 18th April, 1973, the respondent as defendant-debtor gave up that plea and submitted to a decree. The result was that a preliminary mortgage decree was passed on 18th April, 1973. Accepting the correctness of the decision and also his status as ordinary judgment-debtor in a mortgage action without any further privileges under Act XXXVIII of 1972, the respondent is said to have paid a sum of Rs. 1,580 on 18th October, 1973 and asked for further time for the payment of the mortgage debt. Ultimately the final decree was passed on 11th March, 1974. Soon thereafter the respondent paid a sum of Rs. 5,000 towards the final decree and again sought for further time to discharge the mortgage debt. Long after that on 4th November, 1974, the application, out of which the present appeal arises was filed once again seeking relief under Act XXXVIII of 1972, under section 15 of the Act, for scaling down the mortgage debt. The Subordinate Judge negatived the contention of the appellant, having regard to the fact that the respondent as judgment-debtor had given up such alleged privilege even before the passing of the preliminary decree and his conduct thereafter showed that she did not want to revise her stand by seeking such a right or privilege under Act XXXVIII of 1972. This decision was taken up in appeal and the High Court was of the view, that having regard to the language of section 6 of the Act XXXVIII of 1972, the respondent was entitled to seek the scaling down of the mortgage debt, even though such a decree was one which had been passed after the induction of Act XXXVIII of 1972. The question therefore was whether the privilege or concession granted to the judgment-debtors whether in a mortgage action or otherwise, is applicable to decrees which were passed after the introduction or coming into force of Act XXXVIII of 1972.

Held, that Act XXXVIII of 1972, was only an Act to provide relief to certain indebted persons in the State of Tamil Nadu, and section 6 thereof provides that, notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by any debtor on the publication of the Act shall be scaled down in accordance with the provi-

*L.P.A. No. 10 of 1976 against A.A.O. No. 289 of 1975. *27th June, 1979.*

sions of that chapter. The language employed in section 6 of the Act XXXVIII of 1972 is materially the same as the language employed by the Legislature in section 7 of Act IV of 1938. Section 7 of the Act IV of 1938, provided, that, notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with the provisions of the chapter. On a comparison of the language used in section 6 of Act XXXVIII of 1972 and the language of section 7 of Act IV of 1938, it is seen that except, for the difference in the expression "payable by an agriculturist" and "payable by any debtor" the substance of the relief granted by both the Acts appears to be the same. [*Para.* 2.]

In this case the relief that could be asked by a debtor could only be with reference to a decree passed before the commencement of the Act XXXVIII of 1972, and not to those decrees passed after the date of the commencement of the Act. There is yet another feature which would not entitle the respondent to the relief asked for. She sought for relief under Act XXXVIII of 1972, at the written statement stage and gave it up at the stage when the preliminary decree was passed. Her conduct as such showed that she was not inclined to agitate the matter further as is seen from the fact that even after the final decree she was prepared to pay various sums of money towards the final decree and was only asking for time for further payment. This would also estop the respondent from seeking the same relief and once again under the same Act. [*Paras.* 2, 4.]

Cases referred to:—

Varadaraja Pillai v. *Rukmani Ammal*, (1941) 54 L. W. 306: (1941) 2 M.L.J. 359: A.I.R. 1941 Mad. 891 (1), *Kotayya* v. *Venkata Punnayya*, (1940) 2 M.L.J. 202: I.L.R. (1940) Mad. 1023: 52 L.W. 176: A.I.R. 1940 Mad. 910.

Appeal under clause 15 of the Letters Patent against the order of Justice N. S. Ramaswami dated 3rd September, 1975, and made in the exercise of the Appellate Jurisdiction of the High Court in A. A. O. No. 289 of 1975 preferred against the order of the Court of the Subordinate Judge, Kumbakonam dated 19th March, 1975 and made in I.A. No. 738 of 1974 in O.S. No. 133 of 1972.

B. Rajagopalan, for Appellant.

K. Raman, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—This appeal is directed against the judgment of N. S. Ramaswami, J. The respondent as judgment-debtor in a mortgage action sought for the scaling down of a mortgage debt which had ripened into a mortgage decree, under section 15 of Act XXXVIII of 1972 under the following circumstances. In 1970 a mortgage was admittedly executed by the respondent in favour of the appellant. The appellant filed a suit, O.S. No. 133 of 1972 in which the respondent, *inter alia*, claimed the status of a debtor within the meaning of Act XXXVIII of 1972, and therefore the incidental and consequential benefits arising thereunder. But before the preliminary decree was passed on 18th April, 1973, the respondent as defendant-debtor gave up that plea and submitted to a decree. The result was that a preliminary mortgage decree was passed on 18th April, 1973. Accepting the correctness of the decision and also his status as an ordinary judgment-debtor in a mortgage action, without any further privileges under Act XXXVIII of 1972, the respondent is said to have paid a sum of Rs. 1,580 on 18th October, 1973 and asked for further time for the payment of the mortgage debt. Ultimately the final decree was passed on 11th March, 1974. Soon thereafter the respondent paid another sum of Rs. 5,000 towards the final decree and again sought for further time to discharge the mortgage debt. Long after that on 4th November, 1974, the application, out of which the present appeal arises, was filed once again seeking relief under Act XXXVIII of 1972, to wit, under section 15 of the Act, for scaling down the mortgage debt. The learned Subordinate Judge of Kumbakonam, negatived the contention of the appellant, having regard to the fact that the respondent as judgment-debtor had given up such alleged privilege even before the passing of the preliminary decree and that his conduct

thereafter showed that he did not want to revise his stand by seeking such a right or privilege under Act XXXVIII of 1972. This decision was taken up in appeal to this Court in A.A.O. No. 289 of 1975, N. S. Ramaswami, J., was of the view, that, having regard to the language of section 6 of the Act XXXVIII of 1972 the respondent was entitled to seek the scaling down of the mortgage debt, even though such a decree was one which had been passed after the induction of Act XXXVIII of 1972. The question therefore is whether the privilege or concession granted to a judgment-debtor whether in a mortgage action or otherwise, is applicable to decrees which were passed after the introduction or coming into force of Act XXXVIII of 1972. A similar question, but under the present Act, *viz.*, Act IV of 1938, came up for consideration before a Division Bench of this Court for consideration in *Kotayya* v. *Venkata Punnayya*[1]. The learned Judges there had to consider the effect of sections 7 and 8 of Act IV of 1938 and the question whether the *non obstante* clause in section 7 and the words, "whether the debt or other obligation has ripened into a decree or not", in section 8 indicated that all debts incurred before the commencement of that Act should be scaled down irrespective of any decree passed in respect of them, whether such a decree were passed before or after the commencement of the Act. The ambiguity in language between sections 7 and 8 of that Act came up for examination by the Division Bench and the learned Judges expressed the view:

"........In the light of other provisions of the Act and the scheme revealed thereby it is fairly clear that the reference to decree is indeed only to extend the benefit of scaling down to debts which had ripened into decrees before the Act came into force............

It is therefore reasonable to assume that the words "decree", which occurs in the same context is also used subject to the same qualification. It is significant that the machinery provided in sections 19 and 20 for amendment of decree by scaling them down in accordance with the Act and for stay of execution pending proceedings for such amendment are made applicable only to decrees passed before the commencement of the Act and there are no similar provision in respect of decrees passed after the Act came into force".

2. Act XXXVIII of 1972 was only an Act to provide for relief to certain indebted persons in the State of Tamil Nadu, and section 6 thereof provides that, notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by any debtor on the publication of the Act shall be scaled down in accordance with the provisions of that Chapter. The language employed in section 6 of Act XXXVIII of 1972 is materially the same as the language employed by the Legislature in section 7 of Act IV of 1938. Section 7 of Act IV of 1938 provided that, "notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act shall be scaled down in accordance with the provisions of this Chapter". We are not concerned with the other clauses in the section. On a comparison of the language used in section 6 of Act XXXVIII of 1972 and the language in section 7 of Act IV of 1938, it is seen that except for the difference in the expression, "payable by an agriculturist", and "payable by any debtor", the substance of the relief granted by both the Acts appear to us to be the same. If therefore the main intendment and scope of the relief granted to debtors is the same both in Act IV of 1938 and Act XXXVIII of 1972, then the dictum of the decision of the Division Bench in *Kotayya* v. *Venkata Punnayya*[1], has to prevail and has to be adopted. The correctness of the decision came up for consideration before another Division Bench in *Varadaraja Pillai* v. *Rukmani Ammal*[2]. There the Court was asked to refer the decision in *Kotayya* v. *Venkata Punnayya*[1], to a Fuller Bench, but the learned Chief Justice, speaking for the

1. (1940) 2 M.L.J. 202: 52 L.W. 176: I.L.R. (1940) Mad. 1023: A.I.R. 1940 Mad. 910.

1. (1940) 2 M.L.J. 202: 52 L.W. 176 : I.L.R. (1940) Mad. 1023: A.I.R. 1940 Mad. 910.

2. (1941) 54 L.W. 306 : (1941) 2 M.L.J. 359: A.I.R. 1941 Mad. 891 (1).

Court, saw no reason to refer the same to a Fuller Bench. The second Division Bench also agreed with the proposition laid down in *Kotayya* v. *Venkata Punnayya*[1], and we also adopt the same construction in interpreting section 6 of Act XXXVIII of 1972. In this case therefore the relief that could be asked by a debtor could only be with reference to a decree passed before the commencement of the Act XXXVIII of 1972 and not to those decrees passed after the date of the commencement of the Act.

3. The above two decisions were unfortunately not placed before the learned Judge and presumably that was the reason why he was inclined to remit the subject-matter back for fresh disposal, accepting the contention of the respondent that such a scaling down of the debt was possible even in respect of a decree passed after the induction of the Act XXXVIII of 1972.

4. In the instant case there is yet another feature which would not entitle the respondent to the relief asked for. He sought for relief under Act XXXVIII of 1972 at the written statement stage and gave it up at the stage when the preliminary decree was passed. His conduct as such showed that he was not inclined to agitate the matter further as is seen from the fact that even after the final decree he was prepared to pay various sums of money towards the final decree and he was only asking for time for further payment. This would also estop the respondent from seeking the same relief once again under the same Act.

5. For all the reasons stated above, we are not inclined to agree with the conclusion of the learned Judge. The appeal is accordingly allowed. There will, however, be no order as to costs.

R.S. ——— *Appeal allowed.*

1. (1940) 2 M.L.J. 202: 52 L.W. 176; I.L.R. (1940) Mad. 1023; A.I.R. 1940 Mad. 910.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

S. A. M. Jameema Beevi and another .. *Petitioners**

v.

Easwarlal Patel and others .. *Respondents.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), section 14 (1) (b) — Petition for eviction by the power-of-attorney-holder from landlady — Petition whether maintainable.*

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), section 2 (b)—"Landlord"—Definition.*

The civil revision petitions arose out of a common order made by the Rent Control Appellate Authority in an application filed by the petitioners as landladies for evicting four tenants, each of whom was a respondent in each of the civil revision petitions on the ground that the petitioners, required the premises for the purpose of demolition and reconstruction. The Rent Controller as well as the Appellate Authority went into the question whether the petitioner satisfied all the prescriptions laid down in section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960). The concerned finding of fact was that the petitioners had clearly established and satisfied their *bona fide* intention to demolish the building and put up a construction as soon as they obtained delivery of possession of the demised premises. This concurrent finding of fact has not been challenged in the revision petition. But the question whether the petition filed by the power-of-attorney agent of the landladies was maintainable in law was the main subject discussed by both the Rent Controller and the Appellate Authority. The Rent Controller held

* C.R.P. Nos. 2887 to 2890 of 1979. 22nd June, 1979.

that the petition was maintainable and granted an order for eviction. The Appellate Authority took a different view. The power-of-attorney was given by each of the landladies who were co-owners with the person who presented the petition in that capacity. The power-of-attorney in each case was the same and a general one. Under clause (1), the attorney was authorised to let the property to a tenant at such rates as may be favourable; by clause (2) he was authorised to file petitions for fixation of fair rent and for eviction of tenants, before the competent authorities and further prosecute the proceedings in appeals before statutory functionaries; clause (9) enabled the attorney to carry out repairs, remodel or renovate, reconstruct or alter all or any of the landlady's properties whenever necessary and for that purpose incur the necessary expenses and to engage qualified workmen to carry out the abovesaid items of works. In the last paragraph of the power the landlady agreed to ratify and confirm all the acts, deeds and things which the said attorney may lawfully do or cause to be done by virtue of the power-of-attorney, as if such acts, deeds and things were done by the landlady herself in her own person. [*Paras*. 1 *and* 2.]

Under the definition of "landlord" any person who is receiving or is entitled to receive the rent whether on his own account or on behalf of another or as an agent is privileged to file an application for eviction under the provisions of the Act. Section 10 sets out the various conditions under which a landlord can seek for the eviction of a tenant. Under section 10 (8), if a person is authorised to receive the rent or is entitled otherwise to receive the rent merely as an agent of the landlord, he will not, without the previous written consent of the landlord, be entitled to apply for the eviction of tenant. The emphasis therefore is on the expression "merely as an agent". If the receipt of rent is only as an agent then such an agent should be equipped with a permission in writing previously by the landlord to entitle him to seek for the eviction of a tenant. Section 14 is a special provision in that Act for recovery of possession by the landlord for repairs or for reconstruction. Whilst section 14 (1) (*a*) deals with a contingency in which the landlord intends to carry out repairs which cannot be carried out without the building being vacated section 14 (1) (*b*) provides for another contingency in which recovery of possession for reconstruction of the building can be sought for. It says that an application can be made by the landlord, if the building is required *bona fide* by the landlord for the immediate purpose of demolishing it and if such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished. If *bona fide* is established, then the statutory authorities under the Act can pass an order directing the tenant to deliver possession of the building to the landlord before a specified date. But such an order, however, is circumscribed by the specific prescription in section 14 (2) (*b*) of the Act. Section 14 (2) (*b*) provides that no order directing the tenant to deliver possession of the building under section 14 (1) (*b*) of the Act shall be passed unless the landlord gives an undertaking that the work of demolishing any material portion of the building shall be substantially commenced by him not later than one month and shall be completed before the expiry of three months from the date he recovers possession of the entire building or before the expiry of such further period as the Controller may for reasons to be recorded in writing allow. The power-of-attorney contains a provision by which the landlords have agreed to confirm and ratify all acts, deeds and things which the attorney may lawfully do or cause to be done. This provision would certainly enable the competent Authority under the Act take penal action not only against the agent but also against the principal for any failure to keep up to the undertaking. The Appellate Authority surmises that an unscrupulous landlord might avoid penal consequences by putting the attorney in the forefront and asking him to give an undertaking and thereafter attempt to wriggle out of it by stating that he was not responsible for such an undertaking. It all depends upon the facts and circumstances of each case. Under the power-of-attorney under review, power is given to the attorney to carry out repairs, remodel, renovate, reconstruct or alter all or any of the properties, incur the necessary expenses for the same and engage qualified workmen to carry out the said items of work. The under-

taking in the present case is therefore one coming within the meaning of section 14 (2) (*b*) of the Act, and the principal or landlord cannot escape the penal consequences for the non-performance of the undertaking by astute arguments or contentions on the basis that the undertaking was only given by the agent. [*Paras*. 3, 4, 5 *and* 8.]

In this case the undertaking given by the power-of-attorney was one which satisfied the requirements of section 14 (2) (*b*) of the Act and such an undertaking binds the principal in view of the express recitals in the power-of-attorney and no more undertaking was necessary from the landladies themselves. The application was held to be maintainable and the petitioners were entitled to an order of eviction under section 14 (1) (*b*) read with section 14 (2) (*b*) of the Act. [*Para*. 9.]

Case referred to:—

Rahalajmal Khatunal v. *T. V. Brothers*, (1961) 1 M.L.J. 150.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, as amended by Act XXIII of 1973, praying the High Court to revise the order of the IV Judge, Court of Small Causes, Madras, dated 11th February, 1976 and made in respective H.R.A. Nos. 101 to 103 of 1975 and 319 of 1975 (H.R.C. Nos. 1970 to 1972 and 1963 of 1973, VII Judge, Court of Small Causes, Madras).

F. A. Rasheed, for Petitioners

V. Narayanaswami, for Respondents.

The Court delivered the following

JUDGMENT.—These four civil revision petitions arise out of a common order made by the Rent Control Appellate Authority in an application filed by the petitioners as landladies for evicting the four tenants, each of whom is a respondent in each of these civil revision petitions, on the ground that the petitioners required the premises for the purpose of demolition and reconstruction. The Rent Controller as well as the Appellate Authority went into the question whether the petitioners satisfied all the prescriptions laid down in section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), and the concurrent finding of fact is that the petitioners have already established and manifested their *bona fide* intention to demolish the building and put up a construction as soon as they obtain delivery of possession of the demised premises. This concurrent finding of fact has not been challenged before me by learned counsel for the respondents. But the question whether the petition filed by the power-of-attorney agent of the landladies was maintainable in law was the main subject which was discussed by both the Rent Controller and the Appellate Authority. Whilst the Rent Controller held that the petitions were maintainable, and granted an order for eviction, since he was satisfied that the landladies request through their power-of attorney agent was *bona fide*, the Appellate Authority came to a different conclusion. The Appellate Authority was of the view that, even though the petition filed under section 14 (1) (*b*) of the Act was reflective of the *bona fide* of the landladies, yet the undertaking as required under section 14 (2) (*b*) of the Act given by the power-of-attorney agent was incompetent, as the penal consequences for disobedience of the undertaking as provided under section 33 (3) (*b*) of the Act cannot be availed of against the landladies, since they did not personally give the undertaking themselves. In short, the opinion expressed by the Appellate Authority was that, even if it could be assumed that the power-of-attorney agent, who filed the petition, could obtain an order of eviction, he was not competent to give an undertaking as required under section 14 (2) (*b*) of the Act and in that sense the application for eviction was not maintainable. It is as against this order of dismissal of the petitions on the above legal ground the present civil revision petitions have been filed by the landladies represented by their power-of-attorney agent.

2. In order to appreciate the only contention raised before me, it is necessary to refer to the salient provisions of the power-of-attorney given by each of the landladies, who are co-owners, to the person who presented the petition in that capacity. The power-of-attorney has been registered and it was produced before the Rent Controller and the two deeds have been marked as Exhibits P-16

and P-17. As the recitals in each of the power-of-attorney are the same, it is sufficient to note one of them and the recitals therein. The power is a general one. Under clause (1) the attorney is authorised to let the property to a tenant at such rates as may be favourable. Under clause (2) he is authorised to file petitions for fixation of fair rent, for eviction of tenants before the competent authorities and further prosecute the proceedings in appeals before the statutory functionaries. Clause (9) enables the attorney to carry out repairs, remodel or renovate, reconstruct or alter all or any of the landlady's properties whenever necessary and for that purpose incur the necessary expenses and to engage qualified workmen to carry out the aforesaid items of work. In the last paragraph of the power, the landlady agrees to ratify and confirm all the acts, deeds and things which the said attorney may lawfully do or cause to be done by virtue of the power-of-attorney, as if such acts, deeds and things were done by the landlady herself in her own person.

3. The definition of landlord under the Act should be noticed immediately. Under section 2 (6) of the Act, the definition of 'landlord' is as follows:—

> " 'landlord' includes the person who is receiving or is entitled to receive the rent of a building, whether on his own account or on behalf of another or on behalf of himself and others or as an agent, trustee, executor, administrator, receiver or guardian or who would so receive the rent or be entitled to receive the rent, if the building were let to a tenant".

Under the definition any person who is receiving or is entitled to receive the rent whether on his own account or on behalf of another or as an agent is, therefore, privileged to file an application for eviction under the provisions of the Act. Section 10 sets out the various conditions under which a landlord can seek for the eviction of a tenant. For our purpose the *non obstante* clause in section 10 (8) is relevant. It reads as follows:

> 'Notwithstanding anything contained in this section no person who is receiving or is entitled to receive the rent of a building merely as an agent of the landlord shall except with the previous written consent of the landlord, be entitled to apply for the eviction of a tenant".

4. It is seen from section 10 (8) that, if a person is authorised to receive the rent or is entitled otherwise to receive the rent *merely as an agent of the landlord,* he will not, without the previous written consent of the landlord, be entitled to apply for the eviction of a tenant. The emphasis, therefore, is on the expression "merely as an agent". If the receipt of rent is only as an agent, then such an agent should be equipped with a permission given in writing previously by the landlord to entitle him to ask for the eviction of a tenant. It is such an emphasis on the term 'surely', which was noticed by this Court in *Rahalajmal Khatumal* v. *T. V. Brothers*[1]. Srinivasan, J., observed that the word "merely" appearing in section 7 (7) of the Madras Buildings (Lease and Rent Control) Act, XXV of 1949, which is *in pari-materia* with section 10 (8) of the present Act, qualified the extent of the power of the agent and that, where such power was limited *only* to receiving the rent or to be entitled to receive the rent, such an agent could not apply for the eviction of a tenant, unless he was armed with the further power in the shape of previous written consent of the landlord. In the course of the judgment, the learned Judge also observed that it did not mean that, notwithstanding that the agent held a general power which specifically included the power to take steps in eviction proceedings on behalf of the landlord, even then there should be a separate written consent for that purpose. In that case, the learned Judge noticed a power-of-attorney which authorised the atorney to continue, prosecute and defend all legal proceedings in civil, criminal, revenue and rent control Courts and also authorised him to take eviction proceedings against defaulting tenants. Under those circumstances, the learned Judge was of the view that a separate written power for filing an application for eviction of the teant was not necessary. Apart from the fact that under

1. (1961) 1 M.L.J. 150.

section 188 of the Indian Contract Act agent. having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act, the recitals in the power-of-attorney clearly show that the attorney in the instant case has the power to file an application, without any further written consent by the landlady, even in a case where eviction is sought under stction 14 (1) (*b*) of the Act. This is because the attorney is authrised to reconstruct, alter, remodel or renovate the landlay's building, and to incur the necessary expenses for the purpose, by engaging qualified workmen. This power given under the power-of-attorney is enough to safely and reasonably conclude that the agent has been authorised to demolish the building and reconstruct the same. It is common knowledge that reconstruction cannot be done without demolition.

5. Section 14 is a special provision in the Act for recovery of possession by the landlord for repairs which cannot be carried out without the building being vacated, section 14 (1) (*b*) provides for another contingency in which recovery of possession for reconstruction of the building can be sought for. It says that an application can be made by the landlord, if the building is required *bona fide* by the landlord for the immediate purpose of demolishing it and if such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished. If the *bona fide* is established, then the statutory authorities under the Act can pass an order directing the tenant to deliver possession of the building to the landlord before a specified date. But such an order, however, is circumscribed by the specific prescription in section 14 (2) (*b*) of the Act. Section 14 (2) (*b*) provides that no order directing the tenant to deliver possession of the building under section 14 (1) (*b*) of the Act should be passed, unless the landlord gives an undertaking that the work of demolishing any material portion of the building shall be substantially commenced by him not later than one month and shall be completed before the expiry of three months from the date, he recovers possession of the entire building or before the expiry of such further period as the Controller may, for reasons to be recorded in writing, allow. For the purpose of completion, it is convenient to refer to the penalties provided under section 33 of the Act. For our purpose, we are concerned with the penalty contemplated under section 33 (3) (*b*) of that Act. That sub-section provides:

"Any landlord who recovers possession on the ground specified in clause (*b*) of sub-section (1) of section 14 and fails to carry out the undertaking referred to in clause (*b*) of sub-section (2) of the said section without any reasonable excuse shall, on conviction be punishable with fine which may extend to two thousand rupees".

6. Having noticed the relevant provisions of the Act and the express recitals in the power-of-attorney, it is for consideration whether the order of the Appellate Authority is right. In the petition for eviction itself. the attorney who filed the petition on behalf of the landladies, has stated as follows in paragraph 5:

> "The petitioners state that the premises bearing door No. 87/89, N. S. C. Bose Road, Madras-1 is very old and it is required to be demolished immediately. The petitioners intend and have decided to demolish the building as it is pretty old and also for the purpose of erecting a new building on the site of the building. After the reconstruction they require the said premises for their own use and occupation. They have taken other necessary steps for the erection of a new building on the site of the building".

On a fair reading of this paragraph, it is clear that the undertaking which is contemplated under section 14 (2) (*b*) of the Act has been given. The attorney says that the petitioners have decided to demolish the building and that they intend to erect a new building on the site. The mere absence of a reference in the undertaking to the fact that they would demolish the building within a month and complete the reconstruction within three months from the date of the order would not detract from the same being reasonably understood as an undertaking to demolish the building as per the provisions of the Law within the meaning of section 14

(2) (*b*) of the Act. It is not in dispute that the absence of a reference to the period within which the demolition has to be undertaken is not fatal to the maintainability of the applications. What is, however, stressed is that the power-of-attorney cannot give the undertaking under section 14 (2) (*b*) of the Act.

7. This primary contention has to be highlighted in the context of the recitals in the power-of-attorney. I have already expressed the view that under section 5 of the power-of-attorney, the attorney is entitled not only to carry out repairs to the building or renovate the same, but also to remodel, reconstruct or alter the property and incur the necessary expenses for the purpose. Under the power-of-attorney he is also authorised to do all acts, deeds and things which he may lawfully do or cause to be done.

8. The Appellate Authority was of the view that the penal provisions under section 33 (3) (*b*) of the Act cannot be legally enforced against the principal, namely, the landladies. I am unable to agree. The power-of-attorney as already noticed, contains a provision by which the landladies have agreed to confirm and ratify all acts, deeds and things which the attorney may lawfully do or cause to be done. This provision would certainly enable the competent authority under the Act to take penal action not only against the agent but also against the principal for any failure to keep up to the undertaking. The Appellate Authority surmises that an unscrupulous landlord might avoid penal consequences by putting the attorney in the forefront and asking him to give an undertaking and thereafter attempt to wriggle out of it by stating that he was not responsible for circumstances of each case. Under the power-of-attorney under review, power is given to the attorney to carry out, repairs, remodel, renovate, reconstruct or alter all or any of the properties, in the necessary expenses for the same and engage qualified workman to carry out the said items of work. The undertaking in the present case is, therefore, one coming within the meaning of section 14 (2) (*b*) of the Act, and the principal or landlord cannot escape the penal consequences for the non-performance of the undertaking by astute arguments or contentions on the basis that the undertaking was only given by the agent.

9. I find therefore that the undertaking given by the power-of-attorney is one which satisfies the requirements of section 14 (2) (*b*) of the Act and that such an undertaking binds the principal in view of the express recitals in the power-of-attorney, and that no more undertaking was necessary from the landladies themselves. I also find that such an undertaking would bind the landladies in each of the petitions. I also accept the concurrent finding of fact rendered by the Tribunals below on the question of the *bona fides* of the landladies in their requirement of the property for the purpose of demolition and reconstruction. I am therefore, constrained to set aside the order of the Appellate Authority, on the question of the maintainability of the application. I hold that the application is maintainable and that the petitioners are entitled to an order of eviction, under section 14 (1) (*b*) read with section 14 (2) (*b*) of the Act. Accordingly, the order of the Appellate Authority is set aside, and that of the Rent Controller is restored. The respondents-tenants are given four months' time to vacate.

R.S. ——— *Civil revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *V. Sethuraman, J.*

Venkatachalam Chettiar ... *Petitioner**

v.

Adaikappa Chettiar and another ... *Respondents.*

Tamil Nadu Debt Relief Act (XL of 1978), section 10—Execution for restitution of costs awarded in appeal by High Court—Application to stay execution—Execution as regards costs cannot be stayed.

An execution petition was filed for restitution of the costs awarded in appeal by the High Court. The petitioner herein filed an execution application for stay under section 16 of the Tamil Nadu Ordinance V of 1978 which had since been replaced by Tamil Nadu Act XL of 1978. The Court below was of the view that the provisions of the Ordinance could be invoked by a person entitled to scale down the decree or other benefits conferred under the Act and that as regards costs the petitioner was not entitled to claim any relief under the Ordinance.

On revision against the order,

Held, that in the present case section 10 of the Tamil Nadu Act XL of 1978 clearly excluded from the benefits conferred on a debtor a decree debt in respect of costs. Any definition provision as to the meaning of "debt" will have to be considered only in the light of the provisions of the Act. In other words the definition provision would apply only if the context required its application. If the context required, otherwise, then the definition provision would not be in a position to control the rest of the provisions. Having regard to the provisions of section 10 of the Tamil Nadu Act XL of 1978, in the present case, which specifically excludes from the scope of the relief given to a person sought to be benefited by the Act, a decree in respect of costs, it is not possible to stay the proceedings as contemplated by section 16. The lower court was therefore right in its construction of section 16. [*Para.* 6.]

*C. R. P. No. 3108 of 1978.

5th April, 1979.

Case referred to:

Govindaswamy v. *Bala Krishna Reddiar and others*, (1977) 2 M. L. J. 466 : 90 L. W. 707.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Devakottai, dated 20th October, 1978 and made in E. A. No. 170 of 1978 in E. P. No. 17 of 1975 in O. S. No. 33 of 1967.

M. Srinivasan, for Petitioner.

S. Gopalaratnam, for Respondents.

The Court made the following

ORDER:— This civil revision petition has been filed against the order of the learned Subordinate Judge of Devakottai, dated 20th October, 1978 dismissing E. A. No. 170 of 1978 in E. P. No. 17 of 1975. The execution petition was filed for realisation of the costs awarded by this Court in Appeal No. 640 of 1969. The petitioner herein filed the execution application in question for stay under section 16 of the Tamil Nadu Ordinance V of 1978 which has now been replaced by the Tamil Nadu Act XL of 1978. The learned Subordinate Judge was of the view that the provisions of the Ordinance could be invoked by a person who is entitled to scale down the decree or other benefits conferred under the Act and that, as regards costs, the petitioner was not entitled to claim any relief under the said Ordinance. It is this order which is now challenged by the petitioner in the present civil revision petition.

2. As already mentioned, Ordinance V of 1978 has been now replaced by Tamil Nadu Act XL of 1978. There is no dispute that we are now concerned only with the Act, as it is passed, as the Ordinance has been

repealed. This Act has been passed for giving relief to certain classes of indebted persons in the State of Tamil Nadu. The definition of the word, "debt" in section 2 (2) of the said Act runs as follows:

> " 'debt' means any liability in cash or kind, whether secured or unsecured and whether decreed or not, but does not include rent as defined in clause (8)."

3. It is unnecessary to refer to clause (8) as the present case is not one for recovery of rent. Under section 6 of the Act, all debts payable by any debtor on the 14th day of July, 1978 are to be scaled down in accordance with the provisions of Chapter II of the Act. Section 10 provides as follows:

> "Where a debt payable by any debtor includes any sum decreed as costs by any Court, or sums lawfully expended by a mortgagee or other person in order to preserve the property mortgaged, such sum or sums shall be recoverable in addition to the sum recoverable under the provisions of section 7".

Section 15 of the Act dealing with amendment of certain decrees provides that where before the 14th day of July, 1978 a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is a debtor within the meaning of this Act, or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder within six months from the 14th day of July, 1978 apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be. Section 16 contemplates stay of execution proceedings and it provides that every Court executing a decree passed against a person entitled to the benefits of this Act, shall, on application, stay the proceedings until the Court which passed the decree has passed orders on an application made or to be made under section 15. These are the material provisions of the Tamil Nadu Act XL of 1978.

4. The learned counsel for the petitioner contended that the expression "debt" as defined in section 2 (2) of the Tamil Nadu Act XL of 1978 would cover the liability in respect of costs, also, as it would be a liability which has been decreed. The learned counsel drew my attention to a judgment of Ramaprasada Rao, J., as he then was, in *Govindasamy* v. *Balakrishna Reddiar and others*[1]. The contention of the learned counsel was that the provisions of the present Act, namely, Tamil Nadu Act XL of 1978 were in *pari materia* with those in Tamil Nadu Act XV or 1976 so that the said decision would have to be applied to the present case.

5. In the said case the learned Judge was concerned with the definition of the expres sion "debt" as defined in section 2 (*c*) of the Tamil Nadu Act of XV 1976 which ran as follows: "debt"

> "(*i*) means any sum of money which a person is liable to pay under a contract (express or implied) for consideration received; and
>
> (*ii*) includes rent in cash or kind which a person is liable to pay or deliver in respect of the lawful use and occupation of agricultural land".

The question before the learned Judge in that case also was whether costs would fail within the definition of the expression "debt" as defined in that Act. In that case an agriculturist filed an application under section 4 of the Tamil Nadu Act XV of 1976 to stay the execution of the decree for costs. The learned Judge found that there was a contrast between the expression "debt" as defined in the Tamil Nadu Act XVI of 1976 and that defined in the Tamil Nadu Act XV of 1976. Having regard to the definition of "debt" in the Tamil Nadu Act XV of 1976 the learned Judge was of the view that the decree debt was not a debt from payment of which an agriculturist could claim temporary relief under the Tamil Nadu Act XV of 1976. As there was a deliberate

1. (1977) 2 M. L. J. 466 : 90 L. W. 707.

departure made by the legislature, the learned Judge was of the view that an agriculturist was bound to pay the decree debt, while a person who came within the meaning of "an indebted person" under Tamil Nadu Act XVI of 1976 was not expected to respect a decree, but, on the other hand could seek temporary relief in the matter of its satisfaction. The 'debt' contemplated there included any decreed amount including costs. The definition of "debt" in the Tamil Nadu Act XV of 1976 being different from that in the Act with which I am now concerned, the interpretation of the expression "debt" in the Tamil Nadu Act XV of 1976 will not apply to this case. Therefore there is no scope for applying the said decision to the facts of the present case.

6. In the present case section 10 of the Tami Nadu Act XL of 1978 clearly excludes from the benefits conferred on a debtor, a decree debt in respect of costs. Any definition provision will have to be considered only in the light of the provisions of the Act. In other words, the definition provision would apply only if the context required its application. If the context required otherwise, then the definition provision would not be in a position to control the rest of the provisions. Having regard to the provisions of section 10 of the Tamil Nadu Act XL of 1978 in the present case, which specifically excludes from the scope of the relief given to a person sought to be benefited by the Act, a decree in respect of costs, it is not possible to stay the proceedings as contemplated by section 16. The learned Subordinate Judge was therefore right in his construction of section 16.

7. The learned counsel for the petitioner states that he has already filed an application for scaling down the debt before this Court as contemplated by the provisions of the Tamil Nadu Act XL of 1978. His point was that any decision in the present revision petition would have affected the relief that he might claim in the petition filed in this Court. I do not find that there is any scope for the present judgment affecting in any manner the relief that he may claim in any other proceeding. The present revision petition being confined to the execution in respect of costs, which is treated differently under the Act the dismissal of this petition will not affect the disposal of any petition that the petitioner may have filed in order to secure the relief contemplated by the provisions of the Tamil Nadu Act XL of 1978 in respect of the sum other than costs, decreed as against him.

8. The revision petition accordingly fails and is dismissed. There will be no order as to costs.

R.S. —— *Civil revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*A. Varadarajan, J.*

S. P. Janakipathi ... *Petitioner**

v.

1. The Presiding Officer, Labour Court, Madras.
2. The Secretary, the Madras Circle Postal Co-operative Bank Limited, Madras-1 .... *Respondents.*

Constitution of India (1950), Article 226—Gratuity—Payment of—"Pay" means average monthly salary drawn—"Salary" whether includes dearness allowance—"Pay" and "Wages" not different and included dearness allowance.

The petitioner raised an industrial dispute in respect of payment of gratuity and obtained an award against the management. The award Exhibit P.1 provided for payment of gratuity at half a month's salary for every year of service subject to a maximum of 15 months' salary. A note had been added to the award saying that "pay" means the average monthly salary drawn during the last year of the employees' service. A dispute arose between the parties as to whether salary included basic pay and dearness allowance. In the claim petition filed by the petitioner, the Labour Court held that

*W. P. No. 3656 of 1976. 19th June, 1979.

salary mentioned in the award Exhibit P.1 would mean only basic pay and would not include dearness allowance. Against this, the petitioner filed, a writ petition contending that salary includes dearness allowance.

Held, that there could be no difference between the word "pay" and the word "wages" in the matter of computing the benefit of gratuity in the present case. The word "wages" and "pay" used by the Labour Court in the award Exhibit P.1 should be held to include dearness allowance and it is not possible to come to a different conclusion merely because the Labour Court had separately considered the question of basic pay and the question of dearness allowance in the same award. [*Para*. 6.]

Cases referred to :—

Madurai District Co-operative Supply and Marketing Society Ltd. v. *Kumaravelu Pillai*, (1968) 2 L. L J. 294; *Hindusthan Antibiotics Ltd.* v. *Their Workmen*, (1967) 1 L. L. J. 114: (1968) 1 S. C. J 12 : (1967) 1 S. C. R 652; A.I.R. 1967 S.C. 948; *Kumaravelu Pillai* v. *The Madurai District Co-operative Supply and Marketing Society Ltd.*, (1972) 2 L. L. J. 383.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in C. P. No. 74 of 1973 dated 14th September, 1973 on the file of the 1st respondent and quash the same.

G. Venkataraman, for *M/s. Aiyar* and *Dolia*, for Petitioner.

S. Balathandapani, for Respondent.

The Court made the following

ORDER:—This writ petition under Article 226 of the Constitution of India is for the issue of a writ of *certiorari* or any other appropriate writ or order calling for the records of the Labour Court, Madras, relating to Claim Petition No. 74 of 1973, and quashing the order dated 14th September, 1973 passed therein and passing such further or other orders as this Court may deem fit and proper in the circumstances of the case.

2. The petitioner was working as a accountant under the 2nd respondent, the Madras Circle Postal Co-operative Bank Limited, Madras-1. He entered the service in January, 1936, and attained the age of superannuation on 16th June, 1971. In the claim petition filed under section 33-C (2) of the Industrial Disputes Act, 1947, he prayed for computation of the gratuity payable to him on the basis of the award Ex. P-1, dated 29th May, 1970 made in I. D. No. 53 of 1969 on the file of the additional Labour Court, Madras. That award provides for payment of gratuity at half a month's salary for every year of service subject to a maximum of 15 months salary. The award has considered the question of even basic wages and dearness allowances separately and a note has been added to the award saying that "Pay" means the average monthly salary drawn during the last year of the employee's service. There is no dispute regarding the petitioner's right to claim gratuity as per that award. The dispute between the parties was only on the question whether salary for computing gratuity should be taken as basic pay on the basis of which a sum of Rs. 4,593-75 had been paid as gratuity to the writ petitioner or whether it should also include dearness allowance, in which event it is not disputed that the petitioner would be entitled to a sum of Rs. 2,000 claimed in the claim petition. The Labour Court upheld the contention of the 2nd respondent-Management and held that 'salary' mentioned in the award, Ex. P-1 with reference to gratuity would mean only basic pay and would not include dearness allowance and thus disallowed the petitioner's claim. This writ petition has been filed challenging the correctness of that interpretation of the word 'Salary' used in the 'Award' Ex. P-1, with reference to gratuity and it is submitted that the salary should be construed to include basic pay and dearness allowance. The contention urged on behalf of the Management is that the salary should be construed as merely basic pay and should not be held to include dearness allowance. Kailasam, J., as he then was, has held in *Madurai District Co-operative Supply and Marketing Society, Ltd.* v. *Kumaravelu Pillai and another*[1], that on a

1. (1968) 2 L. L. J. 294.

proper construction the word "Pay" in the by-law which was being interpreted by the learned Judge in that case could only mean basic pay without including the dearness allowance. The learned Judge has referred in his judgment to the decision of the Supreme Court in *Hindustan Antibiotics Ltd.* v. *Their Workmen*[1], where the Supreme Court has overruled that dearness allowance may be included in "Pay" for the purpose of arriving at the gratuity payable and that a decision on the question will depend upon the nature of the industry, whether it is a flourishing one and has the capacity to pay and upon the other facts and circumstances of the case. It may be stated in the present case that the Labour Court while framing the scheme in the award, Ex. P-1, has taken into consideration the various circumstances including the capacity of the management to pay the gratuity. The said decision of Kailasam, J., as he then was, went up for consideration before a Bench of this Court in *Kumaravelu Pillai* v. *The Madurai District Co-operative Supply and Marketing Society Ltd., and another*[2]. The learned Judges have observed that the by-law itself, in the context of computing gratuity defined "Pay" as the salary drawn, that the Labour Court has construed it as inclusive of dearness allowance and that it cannot be said that such a construction was not possible or unreasonable. The learned Judges have differed from the view expressed by Kailasam, J. in that decision and held that for computing gratuity the word "Pay" should be held to include dearness allowance. It may be stated in this connection that the learned counsel for the Management does not seek to rely upon the said decision of Kailasam, J. But he submits that he would rely upon the aforesaid decision of the Bench of this Court in *Kumaravelu Pillai* v. *The Madurai District Co-operative Supply and Marketing Society Ltd., and another*[2]. Stressing the following observation made in that decision, *viz.*, "a by-law of a society is not a rule having the force of law and an error in its interpretation by the Labour Court cannot normally, therefore, be removed by this Court on a petition under Article 226 of the Constitution" he submits that this Court has no jurisdiction to entertain a petition under Article 226 of the Constitution to correct any error in an interpretation by the Labour Court in the impugned order that salary for the purpose of computing gratuity should be held to mean only basic pay and not to include dearness allowance. The learned counsel submits that in the present case the award in which the scheme for payment of gratuity has been framed is more or less in the same position as a by-law and, therefore, this Court has no jurisdiction to entertain the writ petition. The learned Judges in *Kumaravelu Pillai* v. *The Madurai District Co-operative Supply and Marketing Society Ltd., and another*[1], had not stated that in all cases where the question of interpretation of a by-law of a society is involved, no writ petition under Article 226 of the Constitution of India will lie. But they have only stated that normally an error in the interpretation of the Labour Court cannot be removed by this Court on a petition under Article 226 of the Constitution. So this decision of the Division Bench does not, in my opinion, help the Management in the present case.

3. "Wages" have been defined in section 2 (*vi*) of the Payment of Wages Act, 1936 as meaning

> "all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes (*a*) any remuneration payable under any award or settlement between the parties or order of a Court etc... ...."

Certain kinds of payments, like bonus, travelling allowance are excluded from the definition of "Wages" in section 2 (*vi*) of the Payment of Wages Act. It is significant

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1. (1967) 1 L. L. J. 114 : (1968) 1 S. C. J. 12 : (1967) 1 S. C. R. 652: A. I. R. 1967 S. C. 948.
2. (1972) 2 L. L. J. 383.

1. (1972) 2 L.L.J. 383.

to note that dearness allowance is not one of the things excluded from the definition, according to which "wages" mean all remuneration, (whether by way of salary, allowance or otherwise) as stated earlier.

4. In section 2 (*rr*) of the Industrial Disputes Act, 1947, "wages" have been defined as meaning :

"all remuneration capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes—

(*i*) such allowances (including dearness allowance) as the workman is for the being entitled to... ......"

In section 2 (21) of the Payment of Bonus Act, 1965, "salary or wages" has been defined as meaning :

"all remuneration (other than remuneration in respect of overtime work) capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to an employee in respect of his employment or of work done in such employment and includes dearness allowance (that is to say, all cash payments, by whatever name called, paid to an employee on account of a rise in the cost of living), but does not includes—

(*i*) any other allowance which the employee is for the time being entitled to............."

(5) In section 2 (*a*) of the Payment of Gratuity Act, 1972, "wages" have been defined as meaning :

"All emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance."

6. Thus, it is seen that in the Industrial Disputes Act, 1947, the Payment of Bonus Act, 1966, and the Payment of Gratuity Act, 1972, dearness allowance is specifically included in the definition of the word "wages" and in the Payment of Wages Act, 1936, it appears to have been included in the words "all remuneration" and is not specifically excluded in the definition. It is not possible to hold that the Labour Court in the present case while exercising powers under the Industrial Disputs Act, 1947, in framing the scheme for payment for gratuity in the award, Exhibit P-1, intended to give a meaning to the word "pay" different from one given to it in the very same Act where no doubt, the word "wages" has been defined and not the word "pay"; In my opinion, there can be no difference between the word "pay" and the word "wages" in the matter of computing the benefit of gratuity in the present case. Relying upon the decision of the Bench of this Court in *Kumaravelu Pillai* v. *The Madurai District Co-operative Supply and Marketing Society Ltd., and another*[1] and of the Supreme Court in *Hindustan, Antibiotics Ltd.* v. *Their Workmen*[2] referred to in the decision in *Madurai District Co-operative Supply and Marketing Society Ltd.* v. *Kumaravelu Pillai and another*[3] and on the definition of the word "wages" in section 2 (*rr*) of the Industrial Disputes Act, 1947, I hold that the words "wages" and "pay" used by the Labour Court in the award Exhibit P-1 should be held to include dearness allowance and that it is not possible to come to a different conclusion merely because the Labour Court had separately considered the question of basic pay and the question of dearness allowance in the same award.

7. The writ petition is, therefore, allowed with costs and the gratuity is computed at the sum of Rs. 2,100 as claimed in the petition filed under section 23-C (2) of the Industrial Disputes Act, 1947. Counsel's fee Rs. 100.

S. J. —— *Petition allowed.*

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1. (1972) 2 L.L J. 383.
2. (1968) 1 S C. J. 12 : (1967) 1 S. C. R. 652: (1967) 1 L. L. J 114 : A. I. R. 1967 S.C. 948.
3. (1968) 2 L. L. J. 214.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao, CJ.*

Vincent .... *Petitioner**

v.

T. Raman ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) (Act (XVIII of 1960) as amended by Act (XXIII of 1973)), section 10 (3) (a) (i)—Scope and applicability Primary requirement is that the landlord should not occupy a residential building of his own.

The petitioner was the landlord. He filed an application under section 10 (3) (*a*) (*i*) of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) to evict the respondent-tenant, on the ground that he required the premises for his own occupation and that such requirement was *bona fide.* Incidentally the question was raised in the course of the trial whether the petitioner had the status of a landlord and whether there was a valid termination of tenancy. Both the Rent Controller and the Appellate Authority found that the petitioner was a 'landlord' within the meaning of the Act and that there had been a valid notice of determination of tenancy. But on the question whether the requirement by the petitioner of the premises for his own occupation was *bona fide* or not, while the Rent Controller held in favour of the landlord-petitioner, the Appellate Authority held against him. The only ground on which the Appellate Authority held against the landlord-petitioner was that he had failed to prove that he was living as a tenant paying rent to a relation-landlord and that, in the absence of proof of payment of rent to another landlord, the fact that the petitioner was residing with his aunt would not suffice to satisfy the requirement of section 10 (3) (*a*) (*i*) of the Act. On revision,

Held: Section 10 (3) (*a*) (*i*) of the Act is very clear, that a landlord may apply to the Rent Controller for an order directing the tenant to put the landlord in possession of the building in case it is a residential building if the landlord requires it for his own occupation and if he is not occupying a residential building of his own. Every person shall have a shelter and if he secures such a shelter with a close relation of his, it is not an equation for saying that he is occupying a residential building of his own. The accent shall not be on the payment of rent or non-payment of rent to a landlord for the premises which he is occupying but the accent should be on the fact whether the building in which he is residing or which he is occupying in his own or not. Indisputably the other property in question belonged to the aunt of the petitioner with whom he was residing from his childhood and he now required his own premises in the occupation of the tenant for the purpose of his own independent living. The finding of the Rent Controller that the requirement of the petitioner was *bona fide* is based on acceptable material and the conclusion of the Appellate Authority is not supportable. This is because the Appellate Authority thought that the petitioner must prove that he is residing in a rented premises paying rent to the owner of that building which he is occupying. The Appellate Authority also thought that even though the petitioner was residing with a close relation of his, since he was not paying rent for such occupation he would not be entitled to seek for possession of his own building. The language of section 10 (3) (*a*) (*i*) does not lend support to such a conclusion. [*Para.* 2.]

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act XVII of 1960 read with Act XXIII of 1976 as amended praying the High Court to revise the decree of the Court of the Subordinate Judge (Appellate Authority), Coimbatore dated 4th March, 1976 in R. C. A. No. 162 of 1975 (R.C. O. P. No. 363 of 1974, District Munsif and House Rent Controller, Coimbatore).

* C. R. P. No. 2950 of 1976.

6th July, 1979.

E. S. Venkatesan and *S. J. Jayadev*, for Petitioner.

T. R. Srinivasan and *Ramamoorthy*, for Respondent.

The Court delivered by the following

JUDGMENT.—The petitioner is the landlord. He filed an application under section 10 (3) (*a*) (*i*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, XVIII of 1960, to evict the respondent-tenant, on the ground that the petitioner required the premises for his own occupation and that such requirement was *bona fide*. Incidentally the question was raised in the course of the trial whether the petitioner had the status of a landlord and whether there was a valid termination of tenancy. Both the Rent Controller and the Appellate Authority found that the petitioner was a landlord within the meaning of the Act and that there had been a valid notice of determination of tenancy. But on the question whether the requirement by the petitioner of the premises for his own occupation was *bona fide* or not, the Rent Controller held in favour of the landlord-petitioner, but the Appellate Authority held against him. The only ground on which the Appellate Authority held against the landlord-petitioner was that he had failed to prove that he was living as a tenant paying rent to the relative-landlord and that, in the absence of proof of payment of rent to another landlord, the fact that the petitioner was residing with his aunt would not suffice to satisfy the requirement of section 10 (3) (*a*) (*i*) of the Act. In this sense, though the Appellate Authority held that the petition was maintainable, because there was no evidence of payment of rent by the petitioner to a third party for his occupation of premises elsewhere it held against him. It is as against this the present civil revision petition has been filed.

2. Section 10 (3) (*a*) (*i*) of the Act is very clear, that a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession of the building, in case it is a residential building, if the landlord requires it for his own occupation and if he is not occupying a residential building of his own in the city. Therefore the primary requirement is that the landlord should not occupy a residential building of his own. The accent should not be on the payment of rent, or non-payment of rent to the landlord for the premises which he is occupying, but the accent should be on the fact whether the building in which he is residing or which he is occupying is his own or not. Indisputably the other property in question belongs to the aunt of the petitioner and it is in evidence that the petitioner was residing with his aunt from his childhood and that he requires his own premises, now in the occupation of the tenant, for the purpose of his own independent living. The finding of the Rent Controller that the requirement of the petitioner is *bona fide* is based on acceptable material and the conclusion of the Appellate Authority is not supportable. This is because of two reasons. Firstly the Appellate Authority thought that, if the landlord wanted to get possession of his own building, he must prove that he is residing in a rented premises paying rent to the owner of that building which he is occupying. The Appellate Authority was of the view that, even though the petitioners was residing with a close relation of his, since he was not paying rent for such occupation, he would not be entitled to seek for possession of his own building. The language of section 10 (3) (*a*) (*i*) does not lend support to such a conclusion.

3. The second ground on which the Appellate Authority rejected the evidence of P. W. 1 (Petitioner) was that he was bent upon evicting the respondent in order to sell the property for a higher price, after getting vacant possession. There is not sufficient material for the Appellate Authority to come to such a conclusion. I agree with the Rent Controller that the requirement of the petitioner is *bona fide*. The civil revision petition is therefore allowed and the order of the Appellate Authority is set aside. There will be no order as to costs.

4. Learned counsel for the respondent seeks for time to surrender possession. The respondent is given three months' time to vacate.

R. S. —— *Civil revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *V. Balasubrahmanyan, J.*

Thangavelu Naicker .... *Appellant**

v.

Muthukumara Chettiar and another ... *Respondents.*

Tamil Nadu Occupant of Kudiyiruppu (Conferment of Ownership) Act (XL of 1971), sections 4, 23—Authorsied Officer—Jurisdiction to decide kudiyiruppu—Civil Court not competent.

Under the plain terms of section 4 of Act XL of 1971, it is the Authorised Officer alone who is competent to decide whether any agriculturist or agricultural labourer was occupying a kudiyiruppu on 19th June, 1971 and since it is within his jurisdiction, it is outside the competence of the civil Courts to decide under the express provisions of section 23. [*Para.* 11.]

When section 4 in clear terms confers jurisdiction on the Authorised Officer to decide the question whether any agriculturist or agricultural labourer was occupying a kudiyiruppu on 19th June, 1971, it was implicit in the section that he had also jurisdiction to decide whether the individual concerned was an agriculturist or agricultural labourer, whether the place under his occupation was a kudiyiruppu or not and whether the occupation was on 19th June, 1971 or not. [*Para.* 11.]

The civil Courts have no jurisdiction to go into the question whether the plaintiff was entitled to protection of the Kudiyiruppu Acts. [*Para.* 15.]

Case referred to:—

Ganesan v. *Madurai Achari*, (1977) T. L. N. J. 437.

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*S. A. No. 331 of 1977.

26th September, 1978.

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam in Appeal Suit No. 70 of 1975, preferred against the decree of the Court of the District Munsif, Kumbakonam in Original Suit No. 191 of 1972.

M. Kalyanasundaram, for Appellant.

The Court delivered the following

JUDGMENT.— One Thangavelu Naicker was appointed by two brothers Muthukumara Chettiar and Somasundaram Chettiar to be a watchman or *kavalkarar* for their account cocoanut thope, Pulianthope and other clusters of trees in two survey numbers in which the own distinct portions. It is common ground that Thangavelu Naicker was paid Rs. 40 every year and was also entitled to take the ripe cocoanut leaves. His duties as *kavalkarar* included gathering, plucking and delivering the fruits of tamarind trees. In 1963, Thangavelu Naicker moved the Authorised Officer functioning under the Tamil Nadu Agricultural Land Record of Tenancy Rights Act for a declaration that he was a cultivating tenant under the two brothers. He did not succeed in obtaining an order in his favour and an appeal from the decision of the Authorised Officer also failed. In those proceedings, it was held that Thangavelu Naicker was not a tenant, much less a cultivating tenant of Muthukumara Chettiar and Somasundaram Chettiar. Thereafter, Thangavelu Naicker filed O. S. No. 191 of 1972 against the owners of the property, asking for a permanent injunction restraining the owners from evicting him from the premises. It may be observed that in the cocoanut thope, Somasundaram Chettiar had raised a hut and in that hut Thangavelu Naicker was permitted to reside for purposes of looking after the thopes. Thangavelu Naicker accordingly claimed in the suit that he was entitled to ownership of the hut and the underlying land as a kudiyiruppu. He invoked the provisions of the Tamil Nadu Occupants of Kudiyiruppu (Confirment of Ownership) Act (XL of 1971). The suit was resisted by the owners of the thope and the superstruc-

ture on the score that after the adverse decision by the duly constituted authorities and the Tribunals under the Tamil Nadu Agricultural Land (Record of Tenancy Rights) Act, 1961, Thangavelu Naicker was disentitled to file a suit for injunction against them. It was also pleaded that the Madras Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971, was not applicable to Thangavelu Naicker or to the suit property in question.

2. The learned District Munsif recorded a finding that Thangavelu Naicker was not a tenant of the land, but he was a *kavalkarar* of the cocoanut and other thopes under the owner Muthukumara Chettiar and Somasundaram Chettiar. But the learned District Munsif held that since there were disputes between Thangavelu Naicker and the owners as early as in 1970 on the question of tenancy rights, he must be held to have ceased to be a watchman or *kavalkarar*. On this basis, the learned District Munsif held that Thangavelu Naicker was disentitled from invoking the provisions of the Act since the said Act was applicable only to an agriculturist or an agricultural labourer who was in occupation of a kudiyiruppu on 19th June, 1971. In this case, according to the finding of the learned District Munsif, he had ceased to be the *kavalkarar* and, therefore, ceased to be the licensee even in 1970.

3. On appeal, the findings of the learned District Munsif were substantially concurred in oy the Sub-Court, Kumbakonam. The learned Subordinate Judge endorsed the finding of the District Munsif that Thangavelu Naicker's occupation as a licensee of the kudiyiruppu must be deemed to have been cancelled since he had raised disputes with the owners of the land claiming to be entitled to tenancy right therein. The learned Subordinate Judge referred to section 61 of the Easements Act and held that the licence given by the owners to Thangavelu Naicker to reside in the kudiyiruppu must be deemed to have been revoked by implication the moment disputes arose between the parties. In the result, concurring with the findings of the learned District Munsif, the learned Subordinate Judge dismissed the appeal and the suit filed by the plaintiff.

4. Thangavelu Naicker has brought this second appeal before this Court against the decisions of the Courts below.

5. Mr. M. Kalyanasundaram, learned counsel for the plaintiff urged in the forefront of his argument that the Courts below were in error in determining the question whether Thangavelu Naicker was or was not entitled to protection under the Kudiyiruppu Act. He referred me to sections 4 and 23 of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act (XL of 1971) and submitted that the question whether his client was or was not an agriculturist or agricultural labourer occupying kudiyiruppu on 19th June, 1971 was a matter which had to be decided only by the Authorised Officer appointed under the Act and was in his exclusive jurisdiction and the civil Courts cannot enter into a determination of the same in any suit or other proceeding.

6. The bar of jurisdiction of the civil Court in the form in which it has been raised before me by learned counsel for Thangavelu Naicker had not been mooted either before the trial Court or before the learned Subordinate Judge. Since, however, the matter goes to the root of the jurisdiction of civil Courts to entertain and determine the central issue in this case, I permitted the learned counsel to raise and argue the point giving opportunity to the learned counsel for the respondent to meet the case

7. In one sense, the objection put forward by the learned counsel for the appellant is self-stultifying because it was his client who invoked the jurisdiction of the civil Courts for protection and it is the very same person who now says that the civil Court has no jurisdiction. However curious the position may be, if really the civil Court has no jurisdiction to go into the matter, I should examine the position irrespective of posture of the parties before me and at the lower stage of the same proceedings.

8. I earlier mentioned that Act XL of 1971 was invoked by the learned counsel. It seems to me, however, that the more appropriate statute would be the Tamil Nadu Occupants of Kudiyiruppu (Protection from Eviction) Act (XXXVIII of 1961), as amended and re-enacted by the Tamil Nadu Occupants of Kudiyiruppu (Protection from Eviction) Re-enact-

ing Act (XXIII of 1975). It may be observed that the definitions of 'Kudiyiruppu', 'agricultural labourer', 'agriculturist', "agricultural land" and 'tenant' are substantially the same in all the Acts. It may also be observed that the Tamil Nadu Kudiyiruppu Protection from Eviction Act, 1961, was put into the statute book as a temporary enactment for a period of two years. By Tamil Nadu Act, XXIII of 1975, it had been put on a permanent basis. The main purpose of Act XXXVIII of 1961 as re-enacted by Tamil Nadu Act XXIII of 1975 is to afford protection to occupants of kudiyiruppu from being evicted by the owners of the land offers an additional right to occupants of kudiyiruppu by declaring that those who have been in occupation of kudiyiruppu on 19th June, 1971, either as tenant or as licensee, shall be the owners of such kudiyiruppu and the kudiyiruppu shall vest in them absolutely free from all encumbrances. In the present case, although Tamil Nadu Act XL of 1971 has been invoked, the relief claimed in the suit itself was one for injunction restraining the defendants from evicting the plaintiff Thangavelu Naicker from the kudiyiruppu. So, the appropriate relief which he might seek even in the special Tribunal under the statute would be not a declaration that the kudiyiruppu has become vested in him as owner, but freedom from eviction by the owners of the property.

9. Section 4 of Tamil Nadu Act XL of 1971 provides that if any dispute arises whether any agriculturist or agricultural labourer was occupying on the 19th June, 1971, such dispute shall be decided by the Authorised Officer for purpose of section 3 of the Act. An appeal is provided against the decision of the Authorised Officer before the District Collector Under section 23 of the same Act, it is clearly provided that no civil Court shall have jurisdiction in respect of any matter which the Authorised Officer is empowered by or under the Act to determine. The same section further provides in express terms that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. An identical provision is to be found in section 11 of the Tamil Nadu Act XXXVIII of 1961 also. The submission of the learned counsel for the appellant is that these provisions impose a clear bar on the civil Court entering into the question as to whether the hut, in which the plaintiff Thangavelu Naicker was permitted to live as a watchman, is a kudiyiruppu and whether he was in occupation of that hut as a kudiyiruppu on 19th June, 1971.

10. It seems to me that that his contention must be accepted on the plain terms of sections 4 and 23 of Tamil Nadu Act, XL of 1971 and section 11 of Tamil Nadu Act, XXXVI I of 1961. Learned counsel for the respondents, however, brought to my notice the decision of a learned single Judge of this Court, N.S.Ramaswami, J A brief report of the decision is to be found in *Ganesan v. Madurai Achari*[1]. N. S. Ramaswami, J., observed that under the statutes relating to kudiyiruppu protection the question whether any house site is a kudiyiruppu or not if not is within the special jurisdiction of the Authorised Officer and the District Collector functioning under the Act. The learned Judge went on to observe that an application before the Authorised Officer can lie only where it is common ground between the parties that the house site is a kudiyiruppu. In the opinion of the learned Judge, the civil Court has jurisdiction to go into the question whether the site is or is not a kudiyiruppu.

11. I am not in a position to accept the entirety of the reason of the learned Judge as borne out by the statutory provisions. It is true that the question whether a given house site is or is not a kudiyiruppu is not within the *exclusive* jurisdiction of the Authorised Officer or the District Collector functioning under the Act. But it cannot be said that the question whether a house site is or is not a kudiyiruppu cannot be decided *at all* by these functionaries. Under the plain terms of section 4 of the Act XL of 1971, it is the Authorised Officer alone who is competent to decide whether an agriculturist or agricultural labourer was occupying kudiyiruppu on 19th June, 1971 and since it is within his jurisdiction, it is outside the competence of the civil Courts to decide under the exclusory provisions of section 23. When section 4 clear terms confers jurisdiction on the Authorised Officer to decide the question whether any agriculturist or agricultural labourer was occupying kudiyiruppu on 19th June, 1971

1. (1977) T. L. N. J. 437.

it is implicit in the section that he has also jurisdiction to decide whether the individual concerned is an agriculturist or agricultural labourer, whether the place under his occupation was a kudiyiruppu or not and whether the occupation was on 19th June, 1971 or not. There is an obvious inconvenience in holding that the Authorised Officer is competent to decide only one question, namely, whether an agriculturist or agricultural labourer was occupying the kudiyiruppu on 19th June, 1971, leaving at large other questions between the parties, namely, whether he is an agriculturist or not, whether he is an agricultural labourer or not, whether the land is a kudiyiruppu or not, to be dicided by common law Courts. If all these questions are within the jurisdiction of the Authorised Officer, then, by definition, they must be outside the jurisdiction of the civil Courts, and as I pointed out, the express terms of section 23 forbid the civil Courts even to issue an injunction in regard to these matters.

12. In the present case, the Courts below have rendered a determination to the effect that the plaintiff Thangavelu Naicker ceased to be a licensee in 1970 itself and hence, he could not be held to be in occupation of the kudiyiruppu as a licensee on 19th June, 1971. This determination has been rendered in the face of section 4 of Tamil Nadu Act XL of 1971. On the basis of my understanding of the provisions of the said Act, I must, therefore, hold that the Courts below had exercised jurisdiction which had been taken away from them by the express provisions of section 23 of that Act. The result is that the matter must properly be the subject of decision or adjudication by the appropriate authority under the Act.

13. Learned counsel for the respondents submitted that in such an event the other ancillary findings rendered by the Courts below in this suit should not be permitted to hamstring the enquiry by the Authorised Officer whether the proceedings are under Act XXXVIII of 1961 or Act XL of 1971. He submitted that his clients should not be regarded as having admitted that the plaintiff was either an agriculturist or agricultural labourer within the meaning of the Act.

14. I think this submission of the learned counsel for he respondents must be accepted as furnishing the correct approach to any future proceedings before the Authorised Officer. I gained an impression, on a reading of the judgments of the Courts below that the question whether Thangavelu Naicker was an agricultural labourer or not has not been disputed by the respondents. This impression I gained because of absence of any discussion on the point. I had earlier pointed out that in the written statement filed by the respondents, they had very clearly stated that the Madras Occupants of Kudiyiruppu Act was not applicable to the plaintiff or to the suit property. In view of this pleading, it is highly unlikely that they would have conceded before the Court any point which was worthwhile being contested before the Court. Hence, while holding that the determination of the Courts below on the question of the plaintiff's right to be entitled to protection under the Tamil Nadu Kudiyiruppu Acts is without jurisdiction, I must also observe that any findings or incidental observations that they had rendered on other questions which essentially have to be gone into for determination of the status of the plaintiff, must also be regarded as not conclusive or binding either on the parties or on the Authorised Officer in any future proceeding or enquiry which he may undertake under the provisions of the Act.

15. In the result, while I agree with the ultimate conclusion of the Courts below that the suit should be dismissed, I hold that the suit would stand dismissed for the reason that the civil Courts have no jurisdiction to go into the question whether the plaintiff is entitled to protection of the Kudiyiruppu Acts. The appeal is accordingly dismissed with the observations made above.

16. There will be no order as to costs.

S. J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *V. Balasubrahmanyan, J.*

G. Subramania Mudali .... *Appellant**

v

Srinivasa Pillai and another ... *Respondents.*

(A) *Civil Procedure Code (V of 1908), Order 21, rule 105—Execution—Auction purchaser moving Court for delivery—Application dismissed as no one was present—Application to set aside dismissal for default filed beyond 30 days—Application for condonation of delay—Application allowed.*

(B) *Indian Limitation Act (XXXIV of 1963), section 5, not invokable in the instant case.*

G's property was sold in execution of a decree against him. The auction-purchaser obtained his sale certificate and moved the executing Court for delivery. The application was dismissed on the day when it was called as nobody appeared. The auction-purchaser moved the executing Court for setting aside the dimissal for default. This application was belated, filed as it was beyond 30 days. Hence the auction-purchaser filed also another application for condonation of delay. This application was opposed by the judgment-debtor on the ground that section 5 of the Limitation Act of 1963, expressly excluded from its purview all applications arising under the execution chapter of the Civil Procedure Code. The application was allowed holding that section 5 of the Indian Limitation Act, 1908 and not of the 1963 Act applied to the case. The judgment-debtor filed this appeal.

Held, the reference in Order 21, rule 105 (4) of the Civil Procedure Code, to section 5 of the Limitation Act, continued to refer, strictly and literally to section 5 of the old Limitation Act, 1908. [*Para.* 12.]

In Order 21, rule 105 of the Civil Procedure Code, the Madras High Court framed the rule expressly referring to section 5 of the Indian Limitation Act, 1908. This express mention of section 5 of the old Act amounted to an express non-inclusion of any subsequent amendment inconsistent with its original meaning and effect. In this view, section 5 of the new Limitation Act, 1963 could not be involved in the present case. [*Para.* 16.]

Case referred to :—

Magnu Ram v. *Delhi Municipality*, (1976) 1 S. C. J. 237 : (19 6) M. L. J. (Crl.) 206 : (1976) 2 S. C. R. 260 : (1976) 1 S. C. C. 392 : 1976 Crl. L. J. 179 : (1976) S. C. C. (Crl.) 10 : A. I. R. 1976 S. C. 105.

Appeal against the order of the Court of the Additional Subordinate Judge, Vellore, dated 1st November, 1975 and made in E. A. No. 413 of 1975 in E. A. No. 11 of 1975 in O. S. No. 123 of 1968.

M. V. Chandran, for Appellant.

M. N. Padmanabhan, for Respondent.

The Court made the following:

ORDER.—This appeal raises a point of principle about condonation of delay in execution proceedings. A question of this sort immediately sets legal minds thinking about section 5 of the Limitation Act, almost by automatic reflex. It did so in this case too. Only its application proved far too involved and ticklish.

2. The problem arose this way. The appellant's property was sold in execution of a decree against him. The auction-purchaser obtained his sale certificate and moved the executing Court for delivery. But this application was dismissed one the day when it was called as nobody appeared. There was a counsel on record, but he was absent. The auction-purchaser thereupon moved the executing Court for setting aside the dismissal for default. Even this application was belated, filed as it was beyond 30 days. Hence the auction-purchaser moved another application for condonation of the delay. On notice of this last application, the judgment-debtor opposed it tooth and nail. The executing Court, however, overruled his objection, allowed the application and condoned the delay. This appeal is against that order.

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* A. A. O. No. 620 of 1975.

2nd April, 1979

3. Section 5 of the Limitation Act very much figured in the Court below. It still dominated the discussion in this Court as well. Actually I heard arguments on two distinct *avatars* of section 5. And throughout the discussion, each side hung on to its own favourite incarnation of the section. Mr. M. V. Chandran, for instance, for the appellant put his faith on section 5 as it appears in the Limitation Act, 1963 now in force. Mr. M. N. Padmanabhan for the respondent, on the other hand, held fast to the previous version of section 5 in the old Indian Limitation Act, 1908. The question is which provision are we to apply in the present case, the old section 5 or the new section 5.

4. If we are to apply the new section 5, it will, as everybody agreed, put a lid on further discussion. For this section expressly excludes from its ambit all applications arising under the execution chapter of the Civil Procedure Code. As Mr. Chandran pointed out, the new section 5, far from helping the auction-purchaser, actually hinders him from getting the relief he requires.

5. Mr. Padmanabhan, however, argued that notwithstanding the repeal and re-enactment of the old Limitation Act of 1908 into the new Limitation Act of 1963, it is to the old section in the old Act to which we must resort for a decision in this case. He pointed out that under the old Act execution proceedings were not excluded from the purview of section 5. He urged that the old section 5 alone would apply to execution proceedings before Courts in this State, because it was that section which even now expressly stands incorporated in the relevant procedural rule in force in this State, namely Order 21, rule 105 (4) of the Code.

6. This Rule, among others, was framed by this High Court, in exercise of its mandatory power under section 122 of the Code. It came into effect on 4th November, 1945. The Rule was couched in the following terms. It has not undergone any change even after the enactment of the new Limitation Act, 1963.

> "(4) The provisions of section 5 of Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)".

7. The submission of Mr. Padmanabhan was that on a combined reading of Order 21, rule 105 (4) and of section 5 of the Indian Limitation Act, 1908, which the said rule expressly refers to, an application would lie for execusing the delay in seeking to set aside the dismissal of an application for delivery.

8. Mr. Chandran, however, countered with the argument that even though Order 21, rule 105 (4), as prescribed in the local amendment in this State, refers to section 5 of the Indian Limitation Act, the reference to that provision must be read as a reference to the corresponding provision of section 5 of the present Limitation Act, 1963. He said that this mode of construction was enjoined by section 18 of the Madras General Clauses Act, 1891.

9. Section 18 of the Madras General Clauses Act lays down a rule of construction for legislation by reference. The rule is that where a statute refers to a provision in another enactment and adopts it, and that other enactment is subsequently repealed and re-enacted, the reference in question in the statute must thereafter be treated as a reference to the provision as so re-enacted. This general Rule, however, is subject to a rider, namely that the legislation by reference may itself evince a contrary intention. This is made clear by section 12 of the Madras General Clauses Act.

10. These principles, as embodied in the General Clauses Act, may call for application in terms only to construction of legislative enactments. But there is no reason why the basic principles cannot be applied to the construction of similar provisions in Rules and other statutory instruments made by rule-making bodies.

11. Turning to Order 21, rule 105 (4), when this Court, as the rule-making authority, made this Rule in 1945, the one and only intention for doing so must have been to enable those who file applications beyond the prescribed period to move the Court for extension of time on showing sufficient cause for the delay. The specific reference to section 5 of the Old Limitation Act, 1908 is meaningful only on this interpretation.

It would be wholly pointless on any other understanding of the reference to section 5. In this context, can we mechanically apply the canon of construction under section 18 of the General Clauses Act, and hold that after the enactment of the new Limitation Act, 1963, our construction of the same Rule must yield a result which proves to be diametrically opposite to the one which was intended by this Court when they drafted the Rule in the first place ? I think there can only be one answer to this question. This Court could not possibly have intended in 1945 that the Rule they were framing should one day be rendered wholly nugatory, not by express repeal of the Rule itself, but by a side-wind of section 5 of the Limitation Act under going an amendment distorting it beyond recognition. To say that rule 105 (4) evinces such an intention would be to attribute to it a wholly self-defeating legislative urge. It is a cardinal principle of construction tha we must prefer that construction which makes the provision work. We cannot, in the name of statutory construction, reduce the provision to a shambles.

12. I am, therefore, quite clear in my mind that the reference in Order 21, rule 105 (4) to section 5 of the Limitation Act continues to refer, strictly and literally, to section 5 of the old Act, 1908. Notwithstanding its repeal and re-enactment in the present Limitation Act, 1963. The result is that the execution Court in this case is quite right in entertaining the auction-purchaser's application for condonation of the delay in seeking to set aside the dismissal for default of the application which he filed under Order 21, rule 103.

13. Mr. Chandran attempted another argument to nullify the effect of Order 21, rule 105 (4). He said that this Rule was a 'special law' within the meaning of section 29 (2) of the present Limitation Act, 1963. As such 'special law', he said, rule 105 (4) cannot escape from the application of the present section 5 of the Act. He said that the only way for rule 105 (4) to avoid section 5 of the new Limitation Act would be to find out if that rule carried any provision expressly excluding section 5 of the new Act from the ambit of the Rule, and not otherwise. He said that rule 105 (4) contains no such exclusory provision. He accordingly maintained that rule 105 (4) cannot serve any purpose at all.

14. This argument of Mr. Chandran is only the other side of the coin. Learned counsel's earlier argument was that section 5 of the new Act excluded rule 105 (4). His present argument is that rule 105 (4) does not exclude section 5 and hence it cannot work. In my opinion, this argument of frustration is also not tenable. It may be conceded that Order 21, rule 105 (3) of the Civil Procedure Code, is a special law within the meaning of section 29 (2) even as the Supreme Court regarded section 417 (3) of the Criminal Procedure Code as a special law. Vide *Mangu Ram* v. *Delhi Municipality*[1]. Order 21, rule 105 may be regarded also as a local law, since it is peculiar to this State. But it does not follow from those premises that section 5 of the new Limitation Act, 1963, would govern rule 105 (3) or (4).

15. Mr. Chandran however relied on the following words in section 29 (2):

> "...... .....provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law".

16. The argument was that there is nothing in rule 105 (4) which "expressly excluded", section 5 of the new Limitation Act from applying. In my view, this is not the way to construe the words in question. The phrase "not expressly excluded" does not mean or imply that exclusion must be in express terms. In my view, the phrase "not expressly excluded" would take note of express exclusion as well as express non-inclusion.

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1. (1976) 1 S. C J. 237 : (1976) M. L. J. (Crl.) 206 : (1976) 2 S. C. R. 260 : (1976) 1 S. C. C. 392 : (1976) Crl. L. J. 179 : (1976) S. C. C. (Crl.) 10 : A. I. R. 1976 S. C. 105.

In Order 21, rule 105, this Court framed the rule expressly referring to section 5 of the Indian Limitation Act, 1908. This express mention of section 5 of the old Act amounted to an express non-inclusion of any subsequent amendment inconsistent with its original meaning and effect. In this view, therefore, I am satisfied that section 5 of the new Limitation Act, 1963 cannot be invoked in the present case.

17. Mr. Padmanabhan urged a broader line of argument for his client when he said if Order 21, rule 105 (4) were held inapplicable to this case, resort may be had to the residuary Article 137 of the Schedule to the Limitation Act, 1963, which would offer a larger period of three years for such an application. I however think that the reference to Article 137 is foreign to the scope of this appeal. The limited question both before the execution Court and in this appeal is whether the application filed by the auction-purchaser under Order 21, rule 105 (4) read with section 5 of the Indian Limitation Act, 1908 was maintainable. We are not concerned with the determination of the appropriate period of limitation, whether it is 30 days or 3 years nor are we concerned with the particular provision for limitation whether it is Order 21, rule 105 (4) of the Code or Article 137 of the Limitation Act, 1963?

18. On the merits of the order passed by the Court below condoning the delay, I am satisfied that the Court did the right thing when it ordered the application. The record shows that learned counsel who had entered appearance for the auction-purchaser was absent in Court when the case was called. It subsequently transpired that he had discontinued his profession and had put his decision into effect by making himself scarce from all law Courts. Apparently, the client was not aware of these developments until long afterwards.

19. I like to imagine that lawyers practising in Courts may have excellent reasons of their own for turning their back on their profession renouncing their robes and shunning the Courts at any given moment. But where the clients are not informed of their decision before hand so as to enable them to make alternative arrangements, the result might well be to leave them in the lurch, and where parties find themselves in a quandary on such occasions, it would be a proper exercise of the Court's good conscience to redeem the litigants from the faults of the lawyers. I am glad to find that this had been the approach of the Court below in this case. I must uphold the order, accordingly as a just order.

20. In the result, this appeal is dismissed and the order of the executing Court is confirmed. There will be no order as to costs.

S. J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

Renown Biscuit Company, a partnership firm, Biscuit Manufacturers, Susson Road Cross Lane, Bombay-27. .... *Petitioner**

v.

Kamalanathan .... *Respondent.*

(*A*) *Civil Procedure Code* (*V of 1908*), *sections 20 and 21—Cause of action — Accrual—Agreement vesting jurisdiction in Court situate in a particular place—Agreement, if can take away jurisdiction of another Court having jurisdiction.*

(*B*) *Civil Procedure Code* (*V of 1908*), *section 115—When order complained of can be interfered by the High Court.*

A suit was filed by the respondent herein for recovery of a sum of Rs. 2,500 on the basis of the appointment of plaintiff-respondent as the sole selling distributor of the biscuits manufactured by the petitioners in the districts of Coimbatore and Nilgiris on 5th July, 1961 and on account of transactions that took place between the parties. The petitioner raised a preliminary objection to the jurisdiction of the Court of the District Munsif, Coimbatore, His case was that clause 13 of the agreement entered into between the parties contemplated the Courts situate in the City of Bombay alone as having jurisdiction to entertain any dispute between the parties. The existence of such a clause in the agreement was not disputed. Equally, as part of the cause of action arose within the Court of the District Munsif, Coimbatore that Court had also jurisdiction. In view of this, the petitioner's case was that, notwithstanding the fact that in law the Court at Coimbatore had jurisdiction in view of the agreement entered into between the parties, the respondent should have filed the suit only in the Court in Bombay, and therefore the Court in Coimbatore cannot entertain the suit in question. The learned District Munsif held that he had jurisdiction to entertain the suit and decided the question of jurisdiction in favour of the respondent herein. This order was sought to be challenged in the present petition.

Held:—There was no controversy on the following facts:—(1) The Court in Bombay had jurisdiction, because the petitioner-defendant resided in Bombay. (2) The Court in Coimbatore had jurisdiction because a part of the cause of action arose there. (3) The parties in clause 13 of the agreement entered into between them had agreed that no Court other than the Courts in the City of Bombay shall have jurisdiction to decide any dispute that may be arising between the parties. In such a context, the general rule is no doubt that the plaintiff-respondent will have to file the suit in the Court in Bombay. However, the Gujarat High Court in *M/s. Snekal Kumar Sarabai* v. *M/s. Economic Transport Organisation and others*, A. I. R. 1975 Guj 72, had struck a new path to the effect that the stipulation can be ignored by the excluded Court which otherwise possesses jurisdiction if the stipulation was considered to be oppressive having regard to the surrounding circumstances including the States involved.

[*Para.* 2

What was involved in this case was not total want of jurisdiction on the part of the Court of the District Munsif, Coimbatore. But for the contract entered into between the parties, there is no dispute that under the Code of Civil Procedure, the learned District Munsif, Coimbatore, will have jurisdiction since a part of the cause of action arose within his jurisdiction. In such a context when the plaintiff is to be compelled to file a suit in the Court of Bombay, it is not because that the Court in Coimbatore did not have jurisdiction in law, but parties having entered into a contract between them, they are compelled to stick to the terms of the contract. In this particular case having regard to the stake involved and the distance between Coimbatore and Bombay, it will be causing failure of justice if the plaintiff is

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*C. R. P. No. 1348 of 1977.

25th January, 1979.

driven to go to Bombay for the purpose of instituting the suit for the recovery of a small amount. Even if the learned District Munsif was wrong in holding, that he had jurisdiction to try the suit, yet the conclusion of the lower Court cannot be interfered with in exercise of the power of the High Court under section 115 of the Code of Civil Procedure. [*Para.* 3.]

The objection to jurisdiction had been taken by the petitioner at the earliest possible opportunity and yet what has to be established under section 21 (1) of the Code of Civil Procedure, is that entertainment of the suit by the learned District Munsif, Coimbatore has caused failure of justice. It cannot be held that there has been a failure of justice by the learned District Munsif holding that he has jurisdiction to entertain and try the suit. [*Para.* 4.]

Cases referred to:—

M/s. Snekal Kumar Sarabai v. *M/s. Economic Transport Organisation*, A. I. R. 1975 Guj. 72; *M/s. Nanak Chand Shudurain* v. *The Tinnevelly-Tuticorin Electric Supply Co. Ltd*, (1974) 2 M. L. J. 431 : 87 L. W. 655 : A. I. R. 1975 Mad. 103.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Coimbatore, dated 21st March, 1977 made in O. S. No. 1317 of 1975.

K. Chandra Mouli, Advocate, for Petitioner.

V. V. Lakshminarayanan, Advocate, for Respondent.

The Court delivered the following

ORDER.—The defendant in O. S. No. 1317 of 1975 on the file of the Court of the District Munsif, Coimbatore, is the petitioner herein. The suit was filed by the respondent herein for recovery of a sum of Rs. 2,500 on the basis of the appointment of the plaintiff-respondent as the sole selling distributor in the biscuits manufactured by the petitioner in the Districts of Coimbatore and Nilgiris on 5th July, 1961, and on account of the transactions that took place between the parties, the plaintiff-respondent qaiming to be entitled to the amount in cuestion. The petitioner raised a preliminary objection to the jurisdiction of the Court of the District Munsif, Coimbatore. The petitioner's case was that Clause 13 of the agreement entered into between the parties contemplated the Courts situate in the City of Bombay alone having jurisdiction to entertain any dispute between the parties. The existence of such a clause in the agreement is not disputed. Equally, as part of the cause of action arose within the Court of the District Munsif, Coimbatore, there is no dispute that that Court has jurisdiction. In view of this, the petitioner's case is that notwithstanding the fact that in law the Court in Coimbatore has jurisdiction, in view of the agreement entered into between the parties, the respondent should have filed the suit only in the Court in Bombay, and, therefore, the Court in Coimbatore did not have jurisdiction to entertain the suit in question. The learned District Munsif held that he had jurisdiction to entertain the suit, therefore, decided the question of jurisdiction in favour of the respondent herein. It is this order which is sought to be revised in the present petition.

2. There is no controversy on the following facts: (1) The Court in Bombay has jurisdiction because the petitioner-defendant resides in Bombay. (2) The Court in Coimbatore has jurisdiction because a part of the cause of action arose there. (3) The parties, in clause 13 of the agreement entered into between them. have agreed that no Court other than the Courts in the City of Bombay shall have jurisdiction to decide any dispute that may be arising between the parties. In such a context, the general rule is no doubt that the plaintiff-respondent will have to file the suit in the Court in Bombay. However, the Gujarat Hight Court in *M/s. Snehal Kumar Sarabhai* v. *M/s. Economic Transport Organisation and others* [1] had struck a new path. In paragraph 3 of the judgment, it was stated that,

> "While parties can lawfully enter into an agreement to restrict a dispute to a particular Court having jurisdiction, that stipulation though valid cannot take away the jurisdiction of the Court which admittedly has jurisdiction. The ouster clause can operate as estoppel against the parties to the

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1. A. I. R. 1975 Guj. 72.

contract. It cannot tie the hands of the Court and denude it of the power to do justice. It is no doubt true that ordinarily Courts would respect the agreement between the parties which is born out of the meeting of their minds and out of considerations of convenience. But the Courts are not obliged to do so in every case. In a case like the present where the claim is of Rs. 1,207-92 to oblige the plaintiff to go to Calcutta merely for the pleasure of respecting the stipulation embedded in the contract between the parties is to deny justice. A new approach to this question deserves to be made for the ouster clause is calculated to operate as an engine of oppression as a means to defeat the ends of justice for in a case like the present it would be oppressive to drive the plaintiff all the way to Calcutta to recover a small sum of Rs. 1,208. The costs of travelling and litigation will far exceed the stakes involved, and even a rightful claimant would be obliged to abandon his claim rather than incur greater expenditure than the sum involved in order to seek redress. In this back-drop the question assumes importance whether the stipulation to confine the jurisdiction in one of the Courts robs the excluded Court of its power to try the suit. Now such a stipulation may be legal and binding on parties. That, however, does not mean that it divests the Court of its jurisdiction. The plaintiff cannot insist that a Court other than the stipulated Court should try the suit. But the court on its part is not bound by the stipuation. The stipulation can be ignored by the excluded Court which otherwise possesses jurisdiction if it is considered to be oppressive having regard to the surrounding circumstances including the stakes involved.

It is this judgment of the Gujarat High Court that was followed by the learned District Munsif in the present case. As soon as this judgment was cited, I asked the learned counsel for the petitioner to bring to my notice any authority or principle which will render the decision of the Gujarat High Court erroneous. The learned counsel, even after taking an adjournment was not able to bring to my notice any authority or principle to that effect. All that he contends, is that the Courts have held that when the parties so agreed to oust the jurisdiction in law and vests the jurisdiction in another Court, which also has jurisdiction, then the parties must go to that Court only. But that is not a principle which can be said to render the new approach referred to by the Gujarat High Court erroneous. If every new approach has to be frowned upon solely on the ground that it is new, there will be neither growth nor progress. Under the circumstances, in the absence of anything directly contrary to the decision of the Gujarat High Court. I do not see any justification for following it.

3. The matter could be looked at from another point of view also. What is involved in the present case is not the total want of jurisdiction on the part of the Court of the District Munsif, Coimbatore. But for the contract entered into between the parties, there is no dispute that under the Code of Civil Procedure the learned District Munsif, Coimbatore, will have jurisdiction since a part of the cause of auction arose within his jurisdiction. In such a context, when the plaintif is to be compelled to file a suit in the Court of Bombay, it is not because that the Court in Coimbatore did not have jurisdiction in law, but the parties having entered into a contract between them, they are compelled to stick to the terms of the contract. As pointed out by a Bench of this Court in *M/s. Nanak Chand Shudurain* v. *The Tinnevelly-Tuticorin Electric Supply Co. Ltd*[1].

> "A marked distinction exists between cases in which Courts lack jurisdiction to try the cases and control jurisdiction is irregularly exercised by Courts. In the former case the Court ought not to have entered upon trial of the suit; in the latter it could have avoided trial, but necessarily not. Competency of Court to try an action goes to the root of the matter and when such competence is not found, it has no jurisdiction at all to try the case. But

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1. (1974) 2 M. L. J. 431 : 87 L. W. 635 : A. I. R. 1975 Mad. 103.

objection based on jurisdiction is a matter which parties could waive and it is in this sense if such jurisdiction is exercis.d by Courts, it does not go to the core of it so as to make the resultant judgment a nullity. Equally well-settled is the proposition that where there are two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen within the jurisdiction of each of these Courts, parties to the concerned transaction can contract to vest jurisdiction in one of such Courts to try disputes which might arise as between themselves. If such a contract is clear, unambiguous, not vague and explicit, it is not hit by section 28 of the Contract Act. This should not be understood as parties contracting against statute. But this is one of many series of contracts available in mercantile practice and forged in the name of commercial expediency."

Thus, it will be seen that even if the learned District Munsif of Coimbatore entertains and disposes of the suit, it will only be an irregular exercise of jurisdiction and the resultant decree will not be a nullity. In such a situation, when the matter is brought before this Court, under section 115 of the Code of Civil Procedure, this Court has a discretion not to interfere with the order is allowed to stand, it would occasion failure of justice or complained of, unless if the order cause irreparable injury to the party against whom it was made. In this particular case, having regard to the stake involved and the distance between Coimbatore and Bombay, it will be causing failure of justice if the plaintiff is driven to go to Bombay for the purpose of instituting the suit for recovery of this small amount. Therefore even if the decision of the Gujarat High Court is not correct, and therefore, the learned District Munsif is wrong in holding that he had jurisdiction to try the suit, yet I am not bound to interfere with that conclusion in exercise of the power of this Court under section 115 of the Code of Civil Procedure.

4. There is another aspect of the matter which also can be taken note of. Section 21 of the Code of Civil Procedure, states :

"No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of the first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice"

It is true that in this case the objection has been taken by the petitioner at the earliest possible opportunity, and yet what has to be established under section 21 (1) of the Code of Civil Procedure is that entertainment of the suit by the learned District Munsif, Coimbatore, has caused failure of justice. I am unable to hold that on the facts of this case, for the reasons already mentioned, there has been a failure of justice by the learned District Munsif holding that he had jurisdiction to entertain and try the suit. For all these reasons, the civil revision petition fails and is dismissed. There will be no order as to costs.

R. S. —— *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—*S. Padmanabhan, J.*

K. Ramasamy .... *Petitioner**

v.

The Government of Tamil Nadu represented by the Commissioner and Secretary to Government, Dept. of Labour and Employment, Madras and another .... *Respondents.*

Industrial Disputes Act (XIV of 1947), section 11-A—Workman dismissed after domestic enquiry—Refusal of Goverment to raise an industrial dispute—Order of Government challenged—Goverment failing to consider whether punishment was in proportion to the misconduct—Government order not in

*W. P. No. 847 of 1977.

10*th July*, 1979

accordance with section 11-A—Writ of certiorari *issued—Constitution of India (1950), Article 226.*

The petitioner, an employee with the 2nd respondent was dismissed from service after a domestic enquiry. The petitioner approached the State Government to raise an industrial dispute regarding his non-employment by the second respondent. The State Government passed an order stating that the charges against the workman had been proved in a properly conducted enquiry and that the Government did not consider it necessary to refer the issue in dispute for adjudication. The petitioner filed a writ petition challenging the Government Order as not in accordance with sections 12 (5) and 11-A of the Industrial Disputes Act.

Held: A perusal of section 11-A made it clear that the Labour Court could even hold that the proved misconduct did not merit punishment by way of discharge or dismissal, and therefore could award to the workman any lesser punishment. The section conferred power on the Tribunal to interfere with the punishment imposed in the domestic enquiry and alter the same. Such being the legal position one of the relevant factors which the Government should have borne in mind before refusing to refer the dispute for adjudication was the question whether the proved misconduct did merit the punishment of discharge or dismissal. The impugned order did not show that this fact was taken into consideration before it was passed. [*Para.* 5.]

When once the High Court was satisfied that the Government had not applied its mind to the provisions contained in section 11-A of the Industrial Disputes Act, it would be open to the High Court to quash the order of the State Government. [*Para.* 14.]

Cases referred to:—

State of Bombay v. *Krishnan*, (1960) 2 L. L. J. 592 : (1961) 2 S. C. J. 360 : (1961) 1 S. C. R. 227 : A. I. R. 1960 S. C. 1223 ; *Workmen of Firestone Tyre and Rubber Company* v. *Management*, (1973) 1 L. L. J. 278 ; *Workmen of C.C.C.* v. *State of Kerala*, (1976) 2 L. L. J. 108: 49 F. J. R. 496 : (1976) K. L. T. 125 ; *Kamdar Sangh* v. *State of Gujarat*, (1977) 2 L. L. J. 353 ; *Indian Iron and Steel Company. Ltd.* v. *Bamapoda Mukherjee*, 1958 L. L. J. 260 : (1958) M.L. J. (Crl.) 206 : 1958 S. C. R. 667 : 1958 S. C. J. 285 : A. I. R. 1958 S. C. 130; *Prem kakar* v. *State of Haryana*, (1976) 3 S. C. C. 433 : (1976) 3 S. C. R. 1010 : A. I. R. 1976 S. C. 1474; *Commissioner of Police* v. *Gordhanda*, 1951 S. C. J. 80:3 1952 S. C. R. 135 : 65 L. W. 212 ; A. I. R. 1953 S. C. 16 : *Workmen J & P. Coats* v. *State of Kerala*, (1977) 2 L. L. J. 534 : (1978) Lab. I. C. 265 : (1977) K. L. T. 546 : 51 F. J. R. 176 ; *Mohinder Singh Gill* v. *Chief Election Commissioner*, (1978) 1 S. C. C. 405 : (1978) 2 S. C R. 272 : (1978) 2 S. C. J. 441 : A. I. R. 1978 S. C. 851.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed there with the High Conrt will be pleased to issue a writ of *mandamus*, directing the first respondent to reconsider the decision contained in G. O. Rt. No. 534, dated 10th March, 1977 and ingore the reasons contained therein and refer the dispute relating to the non-employment of the petitioner to the Labour Court or the Industrial Tribunal for adjudication.

A. L. Somoyaji, for Petitioner.

N. R. Chandran, for Government on behalf of Respondent No 1.

K. Ramamurthy, for Respondent No. 2.

The Court made the following

ORDER.—The petitioner has filed this writ petition because the State Government had refused to refer the issue regarding his non-employment by the second respondent, Ammapet Weavers Co-operative Production and Sales Society Ltd., Ammapettai for adjudication by the Labour Court. The impugned order of the Government reads as follows :

"The Government have examined the conciliation report of the Labour Officer, Salem in regard to the industrial dispute between the workman, Thiru, K. Rama-

samy and the Management of Ammapet Handloom Weavers Co-operative Production and Sales Society Limited, Salem over the issue regarding his non-employment and pass the following orders:

'It is clear that the charges against the workman have been proved in the properly conducted enquiry'. The Government do not, therefore, consider it necessary to refer the issue in dispute for adjudica tion."

2. The petitioner was employed by the second respondent from the year 1959. Between 1st July, 1974, and 30th Septemper, 1974, the petitioner was working in T. Nagar branch at Madras. While so, the management found that there was shortage of stock in espect of that period. Therefore, the management, the second respondent issued a charge memo. to the petitioner alleging that he failed to furnish sureties in the place of the person who had died and the other who had got himself discharged and that he did not make good half of the stock deficit amount which he agreed to pay and that he absented himself from duty till 17th March, 1975. On these charges a domestic enquiry was held and thereafter the petitioner was dismissed from service with effect from 17th March, 1975.

3. Mr. Somayajulu for the petitioner contended that under section 12 (5) of the Industrial Disputes Act, 1947, the State Government was bound to give reasons for refusing to refer the dispute to the Labour Court for adjudication. The learned counsel submitted that on the face of the order the only reason given by the State Government for refusing to refer the dispute for adjudication to the Labour Court is that the charges against the workman had been proved in the properly conducted enquiry. Section 11-A was introduced in the Industrial Disputes Act on 15th December, 1971. Under the said section wide powers equivalent to appellate powers have been conferred on Labour Court, Tribunals and National Tribunals. It will be now open to the Labour Court to examine a case on the merits and if it is satisfied that the order of discharge or dismissal was not justified it will be open to the Labour Court to set aside such order and direct reinstatement of the workman on such terms and conditions as it thinks fit or give such relief to the workman including the award of lesser punishment. In the light of this section Mr. Somayajulu urged that the Labour Court has power in a given case to consider the question whether even if the charges against the workman had been proved in a regularly conducted enquiry, the punishment noted out to the workman was just and proper or whether only a lesser punishment was called for. In the submission of the learned counsel the State Government ought to have applied its mind to the question of punishment and considered whether from the point of view of the punishment there was any necessity to refer the dispute to the Labour Court.

4. Mr. N. R. Chandran, learned Government Pleader and Mr. K. Ramamurthi for the second respondent vehemently contended that this Court has no jurisdiction to sit in appeal over the order of the Government in refusing to refer a dispute for adjudication to the Labour Court. The Government have stated that it is clear that the charges against the workman had been proved in a properly conducted enquiry and that in those circumstances no further reasons are called for from the State Government to justify their refusal to refer a dispute to the Labour Court.

5. Section 12 (5) of the Industrial D putes Act reads as follows:

"If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such a reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor."

Section 12 (5) therefore imposes a duty on the Government to record and communicate the reasons where the Government decides not to refer a dispute for adjudication to the Labour Court. It is now settled that the order of the State Government under section

12 (5) referring or refusing to refer a dispute to the Labour Court for adjudication is an administrative order. It is also equally settled that Courts have no power in exercise of their power of judicial review to sit in appeal over the order of the Government passed under section 12 (5) of the Act. Nor is it possible for Courts to question the reasons given by the Government for refusing a reference under section 12 (5) of the Act if the reasons are germane and relevant to the question of reference. The scope of section 12 (5) of the Act has been considered in *State of Bombay* v. *Krishnan*[1], where Gajendragadkar, J., as he then was observed as follows:

> "The order passed by the Government under section 12 (5) may be administrative order and the reasons recorded by it may not be justiciable in the sense that their propriety, adequacy or satisfactory character may not be open to judicial scrutiny: in that sense it would be correct to say that the Court hearing a petition for *mandamus* is not sitting in appeal over the decision of the Government; nevertheless if the Court is satisfied that the reasons given by the Government for refusing to make a reference are extraneous and not germane, then the Court can issue, and would be justified in issuing a writ of *mandamus* even in respect of such an administrative order."

The learned Judge has again observed as follows:-

> "The problem which the Government has to consider while acting under section 12 (5) is whether there is a case for reference. This expression means that Government must first consider whether a *prima facie* case for reference has been made out on the merits If the Government comes to the conclusion that a *prima facie* case for reference has been made out, then it would be open to the Government also to consider whether there are any other relevant or material facts which would justify its refusal to make a reference. The question as to whether a case for reference has been made out can be answered in the light of all the relevant circumstances which would have a bearing on the merits of a case as well as on the incidental question as to whether a reference should nevertheless be made or not. A discretion to consider all relevant facts which is conferred on the Government by section 10 (1) could be exercised by the Government even in dealing with cases under section 12 (5) provided of course the said discretion is exercised *bona fide*, its final decision is based on a consideration of relevant facts and circumstances and the second part of section 12 (5) is complied with."

From this decision it will be clear that before passing an order under section 12 (5) the State Government should consider the question fairly and reasonably and take into account all relevant facts and circumstances. Secondly, Government in refusing to make a reference should not take into account extraneous matters which are not germane to the issue on hand. Further, if it is clear that the Government had not applied its mind to all the relevant facts and circumstances before passing an order refusing to refer a dispute for adjudication or the State Government had not given any reasons at all as enjoined under section 12 (5) of the Act, the Court will have the power to interfere with the order of the Government.

Section 11-A of the Act reads as follows:

> "Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a labour Court, Tribunal or National Tribunal for adjudication and in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms, and conditions if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

1. (1960) 2 L.L.J. 592 at 602: (1961) 2 S.C.J. 360 : (1961) S.C.R. 227: A.I.R. 1960 S.C. 1223.

Provided that in any proceeding under this section the Labour Court, Tribunal National Tribunal as the case may be, shall rely only on the materials on record and shall not take fresh evidence in relation to the matter."

This section has been interpreted by Vaidialingam, J., in *Workmen of Firestone Type and Rubber Co.* v. *Management*[1]. In paragraph 47 it is observed as follows :

"The Legislature in section 11-A has made a departure in certain respects in the law as laid down by this Court. For the first time, power has been given to a Tribunal to satisfy itself whether misconduct is proved. This is particularly so, as already pointed out by us, regarding even findings arrived at by an employer in an enquiry properly held. The Tribunal has also been given power, also for the first time, to interfere with the punishment imposed by an employer."

Again in paragraph 62 it is observed as follows :

"We have already expressed our view regarding the interpretation of section 11-A. We have held that the previous law, according to the decisions of this Court, in cases where a proper domestic enquiry had been held, was that the Tribunal had no jurisdiction to interfere with the finding of misconduct except under certain circumstances. The position further was that the Tribunal had no jurisdiction to interfere with the punishment imposed by an employer both in cases where the misconduct is established in a proper domestic enquiry as also in cases where the Tribunal finds such misconduct proved on the basis of evidence adduced before it. These limitations on the powers of the Tribunals were recognised by this Court mainly on the basis that the power to take disciplinary action and impose punishment was part of the managerial functions. That means that the law, as laid down by this Court over a period of years, had recognised certain managerial rights in an employer. We have pointed out that this position has now been changed by section 11-A. The section has the effect of altering the law by abridging the rights of the employer inasmuch as it gives power to the Tribunal for the first time to differ both on a finding of misconduct arrived at by an employer as well as the punishment imposed by him".

In paragraph 38 it is stated thus :

"We are not inclined to accept contentions advanced on behalf of the employers that the stage for interference under section 11-A by the Tribunal is reached only when it has to consider the punishment after having accepted the finding of guilt recorded by an employer. It has to be recommended that a Tribunal may hold that the punishment is not justified because the misconduct alleged and found proved is such that it does not warrant dismissal or discharge. The Tribunal may also held that the order of discharge or dismissal is not justified because the alleged misconduct itself is not established by the evidence. To come to a conclusion either way, the Tribunal will have to reappraise the evidence for itself. Ultimately it may hold that the misconduct itself is not proved or does not warrant the punishment of discharge. In other words, the Tribunal may held that the proved misconduct does not merit punishment by way of discharge or dismissal. It can, under such circumstances, award to the workman any lesser punishment and alter the same has been now conferred on the Tribunal by section 11-A."

This decision is clear authority on the point that by virtue of the power conferred on it under section 11-A the Labour Court or the Tribunal has got the jurisdiction to go into the question whether the proved misconduct merited punishment by way of discharge or dismissal. If it finds that the proved misconduct did not deserve such a serious punishment as one of discharge or dismissal, it can award to the workman any lesser punishment instead. Section 11-A as observed by Vaidialingam, J., confers on the Labour Court or the Industrial Tribunal the power to interfere with the punishment and alter the same.

6. If the true statement of the law as now stands after the introduction of section 11-A is that the Labour Court has not only the power to reappraise the evidence and find out whether the finding of guilt recorded in the domestic enquiry is correct or not, but

1. (1973) 1 L. L. J. 278.

also to see whether the punishment inflicted is in proportion to the gravity of the proved misconduct or is so severe in relation to the gravamen of the charge that has been proved that it has to be altered to one of lesser punishment, then clearly the appropriate Government before passing an order under section 12 (5) refusing to refer a dispute for adjudication will have to apply its mind to the question whether the punishment meted out by the management to the workman is justified by the proved misconduct. It may be in a particular case the misconduct might have been proved in a regularly conducted domestic enquiry. At the same time, the punishment meted out by the management must be justifed by the gravamen of the charged proved If in such cases the Government applies its mind and *prima facie* finds that the punishment imposed was just and in relation to the misconduct proved, the Government would be in order in refusing to refer the dispute for adjudication. On the other hand, if in a given case, the State Government finds that the punishment awarded is very severe in relation to the proved misconduct and the situation called for a lesser punishment, then a case would have been made out for reference under section 12 (5) in view of the fact that section 11-A has conferred a power on the Labour Court to interfere with the punishment also. No doubt it depends upon the subjective satisfaction of the Government to form an opinion in a given case whether the punishment of dismissal or discharge imposed on the workman is in proportion to the severity of the proved miscondut. The Court may not have jurisdiction to review the opinion formed by the Government as a result of the subjective satisfaction. At the same time, the Court will have the power to consider whether the Government did apply its mind to the question of the gravity of the punishment inflicteed in a given case before deciding to refuse a dispute for adjudication under section 12 (5). This is so because the question of severity or otherwise of the punishment in a given case is a matter that can be gone into by the Labour Court in adjudication proceedings, on the basis of the power conferred on it by section 11-A.

7. In *Workmen of C. C. C.* v. *State of Kerala*[1] the State Government refused to refer the dispute to adjudication. The reason given by the Government was that the management had taken action in accordance with the canons of natural justice and *prima facie* the action of the management was not *mala fide*. A petition under Article 226 of the Constitution of India was filed before the Kerala High Court challenging the order passed by the Government under section 12 (5) of the Act. Subramonian Poti, J., observed as follows:

"Section 11-A of the Act was introduced in the Act by an amendment which came into force on 15th December, 1971. That section conferred powers of an appellate nature in the Labour Courts, Tribunals and National Tribunals. The scope of the power under section 11-A has been considered by the Supreme Court in *Workmen of Firestone Tyre and Rubber Co.* v. *Management*[2] This section makes a change in the law by conferring on the Labour Courts, Tribunals and National Tribunals appellate power which enables it to examine a case on the merits and if satisfied that the order of discharge or dismissal was not justified, to set aside such order and direct reinstatement of the workmen on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment. Exhibit P-3 in both these cases was passed subsequent to the commencement of operation of section 11-A of the Act and therefore section 11-A would have applied to any enquiry before a Labour Court, or Tribunal in case there had been a reference. It is therefore said for the petitioners in this case that one of the relevant questions to be considered would be whether evidence recorded at the domestic enquiry would have justified the conclusion reached by the management and further whether in the circumstances of the case the punishment would be merited.

1. (1976) 2 L.L.J. 108 : 49 F. J. R. 496 : 1976 K.L.T. 125.
2. (1973) 1 L.L.J. 278.

These would have been open to consideration and would have relevance in the event of a reference. It is also said that apart from the question of *mala fides* of the management in dismissing the workmen there may be other pleas available by way of challenge to an order dismissing the workmen............The Government by saying that since the proceedings have been taken in accordance with the principles of natural justice *prima facie* it is not *mala fide* has made a very irrational re-mark in saying that since there is no *mala fides* no reference is to be made as if that is the sole ground on which reference could be made. It is particularly so when the scope of an enquiry before an Industrial Tribunal has considerably been enlarged by reason of section 11-A of the Act. I am in agreement with learned counsel for the petitioners that the order of the Government shows that the Government has chosen to apply a wrong test and the approach is quite irrational. The reasons stated by it are not supported by the facts stated in the very order and the reasons do not lead to the conclusion or decision that there need be no reference".

The validity of an order refusing to refer a dispute for adjudication was considered by a Bench of the Gujarat High Court in *Kamdar Sangh* v. *State of Gujarat*[1]. The petitioner-union in the writ proceedings in the High Court had sponsored the dispute relating to the discharge of a workmen and the State Government had refused to make a reference. Earlier the management, had sought approval of the Tribunal under section 33 (2) (*b*) of the discharge of the workman and it was granted subject to the condition that the workman was free to seek a reference for adjudication. The Acting Chief Justice speaking for the Bench observed as follows:

"The Government has passed its order under a complete misconception of its jurisdiction in these labour matters and has not borne in mind the most relevant factors in this case especially of the statutory change in law which had been made after the enactment of section 11-A in the Industrial Disputes Act, 1947 because in case of such industrial disputes relating to discharge or dismissal of a single workman even if the reference was made and the Tribunal was satisfied that the order of discharge or dismissal was not justified, it can set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thought fit or give such relief to the workman including the lesser punishment instead of discharge or dismissal as the circumstances of the case might require."

1. (1977) 2 L. L.I. 353.

8. The impact of this new provision has been examined in the decision in *Workmen of Firestone Tyre and Rubber Co.* v. *Management*[1], by pointing out that section 11-A now gives full power to the Tribunal to go into the evidence and satisfy itself on both the points as to whether the misconduct is proved or not, and if proved, whether it would warrant the punishment of dismissal or discharge. Their Lordships pointed out that now the jurisdiction of the Tribunal to reappraise the evidence and come to its conclusion enures to it when it has to adjudicate upon the dispute referred to it in which an employer relies on the findings recorded by him in a domestic enquiry Such a power to appreciate the evidence and come to its own conclusion about the guilt or otherwise was always recognised in a Tribunal when it was deciding a dispute on the basis of evidence adduced before it for the first time. Now the new law has put both the categories on par by section 11-A. The Tribunal could even hold that the proved misconduct did not merit punishment by way of discharge or dismissal and therefore could award to the workman any lesser punishment instead. Therefore, the power was given to interfere with the punishment or alter the same. The whole ratio of this decision is that the fetters which existed under the old law by limiting the powers of the Tribunal to the limitations evolved in the *Indian Iron and Steel Co. Ltd.'s case*[2] has been now lifted by this new provision and a wide jurisdiction was given to the Industrial

1. (1973) 1 L. L. J. 278.

2. (1958) 1 L. L. J. 260: (1958) M. L.J. (Crl.) 266: 1958 S. C. R. 667: 1958 S. C. J. 285; A. I. R. 1958 S. C. 130.

Tribunal to come to its own decision about the guilt or otherwise of the workman concerned and even to substitute a lesser punishment. The change in law had been effected to cover those specific cases of individual discharge and dismissal and that is why the State Government would have now to keep in mind this enlarged scope of the industrial adjudication in the matters of discharge or dismissal even of an individual workman while making the reference because the original fetters have now been lifted on the Tribunal's jurisdiction."

The learned Acting Chief Justice again observed:

"What lies in the ambit of the Governments' jurisdiction for not making a reference is to consider whether a *prima facie* case for reference existed or not and whether on certain grounds as pointed out by their Lordships, it was not expedient to make a reference as for example, when the claim or was patently frivolous or clearly belated or due to its adverse impact, on the industrial relations in the State, Therefore it is on these mandatory guide lines that this statutory discretion has to be exercised by taking into consideration only these relevant guide lines."

The learned Acting Chief Justice further observed as follows:

"The other decision in *Prem Kakar* v. *State of Haryana*[1] relied upon by Mr. Divecha clearly reiterates this settled legal position. There, the Government had *prima facie* found that the concerned workman was not a workman within the definition of the relevant section and therefore it was held that that order was not violated. That decision could not be pressed in aid in the present case where the Government has ignored the most relevant facts as to the entire change in law enlarging the powers of the Industrial Tribunal for adjudication of this type of disputes under section 11-A and the fact that even the Industrial Tribunal had in this very matter passed a conditional order keeping open this right of the workman. Besides, in any event, after such an exhaustive challenge of the order of the management on various grounds of the inquiry as being not proper and the order being completely vitiated as contended by the union, it could never be stated that the union had not given any proper ground for seeking this reference. Whoever has passed this order on behalf of the Government has completely ignored section 11-A from the statute book and therefore such a totally groundless order is no order in the eye of law and must be set aside even in exercise of writ jurisdiction. In this view the learned Judges set aside the order."

9. It is therefore clear that in this case it is not seen from the order that the Government had kept in mind the provisions of section 11-A of the Industrial Disputes Act. No doubt, in paragraph 2 of the order the Government have stated that it is clear that the charge against the workman have been proved in the properly conducted enquiry. Even if it is assumed from this statement that the Government was satisfied on a *prima facie* appraisal of the evidence that the finding of guilt in the domestic enquiry was correct, the order does not show that the Government considered the question whether the punishment was justified by the proved misconduct. A perusal of section 11-A makes it clear that the Labour Court could even hold that the proved misconduct did not merit punishment by way of discharge or dismissal, and therefore could award to the workman any lesser punishment. The section confers power on the Tribunal to interfere with the punishment imposed in the domestic enquiry and alter the same. This being the legal position one of the relevant factors which the Government should have borne in mind before refusing to refer the dispute for adjudication was the question whether the proved misconduct did merit the punishment of discharge or dismissal. In this case, the impugned order, as I have already stated, does not show that this fact was taken into consideration before the passing of the order.

10. Mr. N. R. Chandran, realising the impact of section 11-A submitted that in paragraph 5 of the counter-affidavit, the Joint Secretary to Government, Labour and Employment Department has stated that

1. (1976) 3 S. C. C. 433: (1976) 3 S. C. R. 1010 A. I. R. 1976 S. C. 1474.

"when the Government on the basis of the facts placed before them was satisfied that the punishment was not disproportionate to the offence and that it did not amount to victimisation, the question of reference to the Labour Court or Industrial Tribunal does not arise." He also referred to the statement in paragraph 3 of the counter-affidavit "the Government have passed orders after considering the conciliation report of the Labour Officer, Salem and taking into account all the facts and circumstances set out therein". The learned Government Pleader therefore submitted that even if it is not apparent from the order, the affidavit filed by the Joint Secretary to Government, Labour and Employment, is clear to show that the Government had in mind the question of the severity or otherwise of the punishment.

11. This contention of the Government Pleader has no merit. It has been held by the Supreme Court and other Courts that when a statutory functionary makes an order based on certain grounds, its validity must be tested by reasons mentioned therein and cannot be supplemented by fresh reasons in the shape of affidavits or otherwise. What was invalid in the beginning cannot become validated by additional grounds later brought out. In *Commissioner of Police* v. *Gordhandas*[1] Bose J., speaking for the Bench stated thus :

> "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself".

12. In a Bench decision of the Kerala High Court in *Workmen J & P Coats* v. *State of Kerala*[2] Balakrishna Erady, J., spoke thus for the Court :

> "Under section 12 (5) of the Act, whenever the appropriate Government takes a decision not to refer a dispute for adjudication there is a mandatory duty cast on it to record its reasons in support of the said conclusion and to communicate such reasons to the parties concerned. It is therefore obligatory on the part of the Government to set out in the communication issued to the parties, clearly and preisely, the grounds on which the request for reference was being declined. The Government cannot, therefore, be heard to say that in addition to the reasons mentioned by them in the order certain other relevant facts or grounds not disclosed in the order had also weighed with them in reaching the conclusion that no reference need be made."

13. In *Mohinder Singh Gill* v. *Chief Election Commissioner.*[1] Krishna Iyer, J, observed as follows:

> "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out."

14. On an analysis of the decisions above referred to it is clear that the Government have not based its decision on a consideration of relevant facts and circumstances. The Government failed to consider a very relevant facts *viz.*, whether the proved misconduct in the instant case merited a punishment of dismissal. When once this Court is satisfied that the Government have not applied its mind to the provions contained in section 11-A of the Industrial Disputes Act, it will be open to this Court to quash the order of the State Government. In the circumstances, the writ petition is allowed and the impugned order dated 10th March, 1977 is quashed. The State Government is directed to dispose of the matter afresh in accordance with law in the light of the observations contained herein. There will be no order as to costs.

R.S. —— *Writ petition allowed.*

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1. 1951 S. C. J. 803: 1952 S. C. R. 135: 65 L. W. 212: A. I. R. 1952 S.C. 16.

2. (1978) Lab I. C. 265: (1977) K. L. T. 546: 51 F. J. R. 176: (1977) 19 L L. J. 534.

1. (1978) 2 S.C.R. 272: (1978) 2 S. C. J. 441: (1978) 1 S. C. C. 405: A. I. R. 1978 S.C. 851.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *V. Balasubrahmanyan, J.*

Abdul Rahiman Rowther, Son of Vapriya Khiya Rowther at Thiruppalathurai, Papanasam Taluk ... *Appellants**

v.

Komalathammal, wife of C. V. Rajagopalachariar at "Parijatham", Luz Church Road, Mylapore, Madras ... *Respondents.*

Civil Procedure Code (V of 1908), section 47 —Suit on mortgage decreed ex-parte*—Application to declare decree as null and void alleging want of territorial jurisdiction —Objection not being one concerning competence of the Court cannot be raised in execution proceedings—Objection also held to have been waived on the facts.*

Two appeals were filed by a judgment-debtor under mortgage decrees against orders passed on application filed by him under section 47 of the Code of Civil Procedure, to declare that the *ex parte* mortgage decrees obtained against him by the decree holder were null and void for want of territorial jurisdiction of the Court which passed the *ex parte* decrees. Applications of the judgment-debtor were dismissed by the lower Court and appeals against the dismissal of the application to the lower appellate Court also shared a similar fate. The learned Subordinate Judge, passed a common judgment in the two appeals holding that the judgment-debtor was not entitled in the execution proceedings to raise a question of want of territorial jurisdiction in the Court which passed the decree.

Held, that the only objection of the judgment-debtor in the present case, was that the properties which were the subject-matter of the suit mortgages were outside the territorial jurisdiction of the learned District Munsif who decreed the suits. This certainly was not an objection going to the competence of the Court. In any case, even this objection must be deemed to have been waived by the judgment-debtor. Waiver may be either express or implied. An implied waiver can be gathered by the conduct of the person who is stated to waive a particular right of his. In this case, by his masterly inaction both at the stage of the preliminary decree and at the stage of the final decree in the suit, the judgment-debtor must be deemed to have waived whatever objection to territorial jurisdiction he might have put forward in his written statement which he filed in answer to the suit claim. [*Para.* 7.]

Cases referred to :—

Rajah Satrucherla v. *Rajah of Jeypore*, (1927) 52 M.L.J. 605: 25 L.W. 671: I.L.R. 50 Mad. 882: A.I.R. 1927 Mad. 627; *Seth Hiralal Pathi* v. *Sri Kali Nath*, (1961) 2 S.C.J. 592: (1961) 2 M. L J. (S. C.) 157 : (1961) 2 An. W.R. (S.C.) 157 : (1962) 2 S. C. R. 747 A.I.R. 1962 S.C. 199:

Appeals against the Appellate Order of the Subordinate Judge, Thanjavur dated 6th day of August, 1974 in C. M. A. Nos. 182 and 175 of 1974 preferred against the order of the District Munsif's Court of Thuraiyar and made in E. A. Nos. 474 and 471 of 1973, in E. P. Nos. 257 and 256 of 1972 in O. S. Nos. 453 and 452 of 1969 dated 9th July, 1973.

Krishnan, for Appellants.

K. Sarvabhauman, for Respondents.

The Court made the following

ORDER.— These two appeals have been filed by the judgment-debtor under a decree. They arise out of applications filed by him under section 47 of the Code of Civil Procedure, to declare that the *ex parte* decrees obtained against him by the decree-holder were null and void for want of territorial jurisdiction of the Court which passed the *ex parte* decrees. These applications of the judgment-debtor were dismissed. The appeals against the dismissal of the applications also shared a similar fate. The learned Subordinate Judge, passed a common judgment in the two appeals holding that the judgment-debtor was not entitled in the execution proceedings to raise a question of

*A. A. O. Nos. 203 and 204 of 1974.
26th July, 1978.

want of territorial jurisdiction in the Court which passed the decree.

2. Mr. Krishnan, learned counsel appearing for the judgment-debtor in these appeals, submits that the suits against his client were on mortgages of immovable properties situate outside the territorial jurisdiction of the Court in which the suits were filed. He further submits that in both the suits preliminary and final decrees for sale were passed by the District Munsif of Thiruvaiyaru as though he had territorial jurisdiction over the subject-matter which he in fact did not possess. Learned counsel pointed out that the judgment-debtor had filed written statements in both the suits questioning the territorial jurisdiction of the learned Distrist Munsif. The contention of the learned counsel is that notwithstanding that the suits were tried and decided *ex parte* against the judgment-debtor, that would not prevent him from applying under section 47 Code of Civil Procedure, for a declaration that the decrees were void and unexecutable since they were passed by a Court not possessing the requisite jurisdiction.

3. Learned counsel cited in support an old ruling of a Division Bench of this Court reported in *Rajah Satrucherla* v. *Rajah of Jeypore*[1]. That was a case of a decree in a mortgage suit for sale in which the mortgagor-defendant sought to raise the question of want of territorial jurisdiction in the trial Court at the stage of execution of the mortgage decree. The mortgagor's particular contention was that the final decree was passed by a Court which did not possess the requisite jurisdiction. It would appear that in that case, between the date of the preliminary decree and the date of the final decree in the mortgage suit, the local area in which the property was situate was taken away from the jurisdiction of the Sub-Court in which the suit was filed. Objection having been taken against execution on the score that the Court which passed the decree had no jurisdiction to do so, the question before the Court was whether the judgment-debtor, by his conduct, had waived his right to object to the jurisdiction before the passing of the final decree. The learned Judges, Wallace and Jackson, JJ., who decided the case, held that even where there was a waiver of a right to object to jurisdiction before the trial Court, that would not bar a party from raising the question in execution preceedings. In that view, the learned Judges held that the sale of the mortgaged property in execution of the decree was without jurisdiction and set aside the sale on the ground that the final decree itself was passed by a Court without jurisdiction.

4. This decision was apparently cited by Mr. Krishnan, because the ground on which the two Courts below had rejected the judgment-debtor's objection in the present case was that he must be deemed to have waived his objection to jurisdiction when he remained *ex parte* both at the stage of the preliminary decree and at the stage of the final decree.

5. While the decision cited by learned counsel is apposite for the present purpose, I am of the view that it is no lenger good law in view of the clear enunciation of the legal position by the Supreme Court in a case reported in *Seth Hiralal Pathi* v. *Sri Kali Nath*. The point which arose in the case before the Supreme Court was whether the judgment-debtor under a decree passed by the High Court of Bombay could apply for a declaration that it was null and void on the score that, in the first place, the High Court had no jurisdiction to entertain and try and determine the suit. It appeared from the facts in that case that the suit was entertained by the High Court after it gave leave to sue on the score that a part only of the cause of action accrued within the territorial limits of the jurisdiction of the Bombay High Court. Half-way through the suit, the matter was referred to an arbitrator and subsequently, the award of the arbitrator was passed into a decree by the High Court. The decree of the High Court was transferred for execution to the District Judge, Agra. Before the executing Court, the judgment-debtor raised

1. (1927) 52 M. L. J. 605 : 25 L. W. 671 : I. L. R. 50 Mad. 882 : A. I. R. 1927 Mad. 627.

1. (1961) 2 S. C. J. 592: (1961) 2 M. L. J. (S. C.) 157: (1961) 2 An. W. R. (S. C.) 157: (1962) 2 S. C. R. 747: A. I. R. 1961 S. C. 199.

the question of jurisdiction of the Bombay High Court to pass the decree. It was contended before the Supreme Court that the Bombay High Court was not right in granting leave to sue to the plaintiff inasmuch as no part of the cause of action accrued within the territorial limits of that High Court. The Supreme Court dealt with this contention in the following passage:—

> "Whether the leave obtained had been rightly obtained or wrongly obtained is not a matter which can be agitated at the execution stage. The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have sesin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it."

6. Proceeding further, the Supreme Court distinguished between an objection to jurisdiction in the sense that the objection goes to the root of the jurisdiction, on the one hand and an objection to jurisdiction which is based purely on the territorial distribution of the business of administration of justice as between different Courts. The Court observed:

> "It is well-settled that the objection as to local jurisdiction of a Court does not stand on the same footing as an objection to the competence of a Court to try a case. Competence of a Court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to local jurisdiction of a a Court can be waived and this principle has been given a statutory recognition by enactments like section 21 of the Code of Civil Procedure".

On the facts of the particular case before them the Supreme Court held that when the defendant agreed to resolve the question in controversy in that suit by a reference to arbitration, he must be deemed to have waived his objection as to territerial jurisdiction of the Bombay High Court. In the circumstances, the Supreme Court held that the defendant was estopped from challenging the jurisdiction of the Bombay High Court to entertain the suit at any subsequent stage. On this basis, the Supreme Court held that the judgment-debtor was not entitled to object to the execution being levied on the basis of the judgment of the Bombay High Court.

7. In my view, this authoritative pronouncement of the Supreme Court making a distinction between an objection, as to inherent lack of jurisdiction, on the one hand, and a mere objection, to the territorial jurisdiction of the Court on the other, is germane to the present case. The only objection of the judgment-debtor, in the present case, is that the properties which were the subject-matter of the suit mortgages were outside the territorial jurisdiction of the learned District Munsif of Thiruvaiyaru. This certainly is not an objection which goes to the competence of the Court. In any case, even this objection must be deemed to have been waived by the judgment-debtor. Waiver may be either express or implied. An implied waiver can be gathered by the conduct of the person who is stated to waive a particular right of his. In this case, by his masterly inaction both at the stage of the preliminary decree and at the stage of the final decree in the suit, the judgment-debtor must be deemed to have waived whatever objections to territorial jurisdiction he might have put forward in his written statement which he filed in answer to the suit claim.

8. In these circumstances, I must reject the contention of learned counsel for the judgment-debtor. The appeals are dismissed and the order of both the lower Courts are confirmed. However, there will be no order as to costs.

R. S. —— *Civil Miscellaneous Appeals dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam, CJ., V. Ramaswami and V. Balasubrahmanyan, JJ.*

****Akilandam Ammal** .. *Appellant**

v.

Indrani and others .. *Respondents.*

Tamil Nadu Agriculturists' Relief Act (IV of 1938), section 8 (as amended by Act VIII of 1973)—Effect of amendment of Explanation (1)—*All payments adjustable only towards principal—Interest would stand wiped out.*

The framers of the Act never intended that the creditor should get anything more than the principal. The refinement that has been made after the amendment in 1973 is that whatever amount has been paid will be adjusted towards the principal. The result will be that the creditor will lose the interest as all payments will have to be adjusted towards the principal and the principal will get reduced. The change that has been brought about is that though under the Act before the amendment the interest paid under certain circumstances was not adjusted towards the principal and thus the principal still remained payable, by virtue of the amendment to the *Explanation* to section 8 all payments are adjusted only towards the principal, thus reducing the principal amount payable. The result would be that even in the absence of sub-section (1) of section 8, the interest would stand wiped out. [*Para.* 3.]

Case referred to:—

Ramanatha Chettiar v. *Gomanathan Chettiar*, (1974) 1 M.L.J. 221.

Appeal under clause 15 of the Letters Patent against the Judgment and decree of N. S. Ramaswami, J., dated 2nd July, 1975 in C.M.A. No. 524 of 1973, preferred against the order of the Sub-Court, Tiruchirapalli in E.P. No. 416 of 1972 in O.S. No. 153 of 1969.

*L.P.A. No. 80 of 1976. *6th December, 1976*

**This case had escaped notice. Delay in publishing the judgment is regretted—Ed.

T. R. Rajagopalan and *T. R. Rajaraman,* for Appellant.

V. Ratna Mudaliar and *R. Shanmugham,* for Respondent.

The Judgment of the Court was delivered by

Kailasam, CJ.—This appeal is preferred by the decree-holder. He filed the suit, O. S. No. 153 of 1969 for the recovery of a sum of Rs. 10,591.50 being the principal and interest due on a promissory note executed by the first defendant's husband and the father of the other defendants in favour of the plaintiff for a sum of Rs. 10,000 payable with interest at 12 per cent. per annum, but the claim being restricted to six per cent. per annum. The suit was filed on 11th April, 1969 and a decree was obtained on 16th February, 1970. Interest on the principal amount was paid on various dates. According to the plaintiff three amounts were paid towards his loan: a sum of Rs. 2,500 on 13th April, 1970; a sum of Rs. 1,000 on 21st November, 1970; and a sum of Rs. 2,500 on 24th July, 1971; in all a sum of Rs. 6,000. The only question is how this amount should be appropriated. According to the plaintiff the interest amounts to Rs. 2,222-83 and, therefore, giving credit to the sum of Rs. 6,000 the amount outstanding is Rupees 4,000 principal and Rs. 2,222-83 interest. According to the defendant (judgment-debtor), as a sum of Rs. 6,000 has been paid, the principal outstanding is only Rs. 4,000 and the decree-holder will be entitled to interest only from 1st May, 1972, to 21st March, 1973 at nine per cent. per annum, as provided for under the Tamil Nadu Agriculturists' Relief Act.

2. Section 7 (1) of the Tamil Nadu Agriculturists' Relief Act provides that, notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist on the 1st March, 1972, shall be scaled down in accordance with the provisions of Chapter II of the Act. Sub-section (2) of section 7 provides that no sum in excess of the amount as scaled down shall be

recoverable from him. Section 8 is important and it provides that debts incurred before the 1st March, 1972, shall be scaled down in the manner mentioned thereunder namely,

(1) Omitted.

(2) Where an agriculturist has paid to any creditor twice the amount of the principal whether by way of principal or interest or both, such debt, including the principal, shall be deemed to be wholly discharged.

(3) Where the sums repaid by way of principal or interest or both fall short of twice the amount of the principal, such amount only as would make up this shortage, or the principal amount as is outstanding, whichever is smaller, shall be repayable.

(4) ....

Explanation 1: In determining the amount repayable by a debtor under this section every payment made by him shall be credited towards the principal, notwithstanding that he has expressly stated in writing that such payment shall be in reduction of interest.

Sub-section (1) of section 8, before it was omitted by the amending Act VIII of 1973, read as follows—

> (1) All interest outstanding on the 1st October, 1937, in favour of any creditor of an agriculturist, whether the sum may be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date.

Explanation 2 to section 8, as it stood before the amendment, read as follows—

> "In determining the amount repayable by a debtor under this section every payment made by him shall be credited towards the principal unless he has expressly stated in writing that such payment shall be in reduction of interest."

Now in *Explanation* (1) after the amendment by Act VIII of 1973, instead of the words 'unless he has expressly stated in writing', the words, 'notwithstanding that he has expressly stated in writing' have been substituted, the result being that after the amendment of *Explanation* (1) by Act VIII of 1973, whenever any payment is made, it should be adjusted towards the principal, even though it might be expressed to be a payment towards the interest.

3. The contention put forward on behalf of the appellant (decree-holder) is that as sub-section (1) of section 8 has been omitted by Act VIII of 1973, the interest outstanding is not wiped out, with the result that the liability to pay interest continues. Therefore, according to the learned counsel for the appellant, while every payment made should be adjusted towards the principal, the interest accrued on the principal till such payment or on the principal as it stood after the payment of interest would continue and would be payable in addition to the principal. On the other hand, learned counsel for the respondents submits that the contention of the appellant is opposed to the provisions of sub-section (3) of section 8 of the Act. His submission is that while *Explanation* (1) to section 8 makes it compulsory that every payment made by the debtor should be credited towards the principal sub-section (3) of section 8 makes only the principal, after such adjustment, payable under the Act. Sub-section (2) of section 8 provides—

> "Where an agriculturist has paid to any creditor twice the amount of the principal whether by way of principal or interest or both, such debt including the principal shall be deemed to be wholly discharged."

There is no difficulty so far as sub-section (2) of section 8 is concerned and the controversy only centres round sub-section (3) of section 8. Sub-section (3) provides, firstly, that where the sums repaid by way of principal or interest or both fall short of twice the amount of the principal, such amount only as would make up the shortage shall be repayable. So far as this part of the provision is concerned, there is no problem for the amount payable is taken as twice the principal, and all amounts paid towards the principal and interest should be given credit to, and the liability is confined only to the

amount that would fall short of twice the principal. ... The controversy relates to the later clause, "or the principal amount as is outstanding, whichever is smaller shall be repayable". Under sub-section (2) of section 8, the amount that falls short of twice the principal amount or the principal amount as is outstanding alone is repayable. Under sub-section (1) of section 8 as it stood before its amendment by Act VIII of 1973, or under sub-section (3) of section 8 with which we are dealing, the intention appears to be clear that what the creditor is entitled to, is only the principal amount, or, if some amount had been paid towards the principal, the amount outstanding after giving credit to such payment. Now the effect of the amendment of *Explanation* (1) to section 8 is that whatever payment has been made, it is adjustable only towards the principal and therefore, the principal would automatically get reduced whenever any such payment is made. Thus only the principal outstanding, is payable under sub-section (3) of section 8. As this section specifies the principal which is payable, the Legislature omitted section 8 (1) as there was no necessity for providing for the wiping out of the interest. Under section 8 (3) of the Act, before the amendment in 1973, the amount payable was either the amount which fell short of twice the amount of the principal or the principal as was outstanding on that day. It is therefore clear that the framers of the Act never intended that the creditor should get anything more than the principal. The refinement that has been made after the amendment is that whatever amount has been paid will be adjusted towards the principal, which will reduce the principal. The result will be that the creditor will lose the interest as all payments will have to be adjusted towards the principal and the principal will get reduced. The change that has been brought about is that, though under the Act before the amendment the interest paid under certain circumstances was not adjusted towards the principal and thus the principal still remained payable, by virtue of the amendment to the *Explanation* to section 8 all payments are adjusted only towards the principal, thus reducing the principal amount payable. The result would be that even in the absence of sub-section (1) of section 8, the interest would stand wiped out.

4. This was the view taken by a Bench of this Court in *Ramanatha Chettiar* v. *Omanathan Chettiar*[1]. We agree with the view taken by the learned Judges and hold that the contention put forward by the judgment-debtor is right. The appellant will be entitled to a decree for only a sum of Rs. 5,453. The result is that the appeal is dismissed, but, in the circumstances of the case, there will be no order as to costs.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

Mohamed Ibrahim and another .. *Petitioners**

v.

Abdul Azeez, represented by his Power Agent, M. Mohamed Jaffar .. *Respondent.*

Civil Procedure Code (V of 1908), Order 37, rule 2—Under-chapter suit —Allegation of plaintiff obtaining assignment of promissory note from original promisee—Defendants' prayer for unconditional leave—Allegation of defendants being agriculturists entitled to benefits—Conditional leave granted.

An 'under chapter' suit was filed by the respondent on the foot that he had obtained an assignment of the suit promissory note from the original promisee.

The revision petitioners applied under Order 37, rule 8, Civil Procedure Code, praying for unconditional leave to defend the suit but the Subordinate Judge declined to grant unconditional leave and granted them conditional leave by calling upon them to deposit one-half of the suit amount before entering defence. To challenge the correctness of that order the petitioners preferred the present revision petition.

Held: The contention of the petitioners that the Subordinate Judge had found that their claim raised a triable issue for consideration

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1. (1974) 1 M.L.J. 221.

*C.R.P. No. 236 of 1979. 20*th June*, 1979.

in the suit cannot be sustained. The plea regarding the status of the petitioners as agriculturists entitled them to only certain benefits in the matter of scaling down of interest. It will not impinge upon their liability to pay the amount claimed under the suit promissory note especially when the petitioners had not denied their liability under the promissory note. Such being the case, it is futile for the petitioners to contend that they have raised a triable issue in the case and in view of the acceptance of their stand by the Court below, they should not have been called upon to deposit one half of the suit amount as a condition precedent. In that view of the matter, the order of the Court below can well be sustained. [*Para.* 5.]

The petitioners were given two months time from the date of the High Court's order to deposit the amount directed by the lower Court to be deposited. [*Para.* 6.]

Cases referred to:—

M/s. Baba Industries v. *Mehta Traders*, (1977) 2 M.L.J. 479: 90 L.W. 704: A.I.R. 1978 Mad. 146; *Raghavaveera Sons* v. *Mrs. Padmavathi*, (1978) 1 M.L.J. 36: 90 L.W. 697: A.I.R. 1978 Mad. 81.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge, Nagapattinam dated 6th October, 1978 and made in I.A. No. 928 of 1975 in O.S. No. 82 of 1975.

V. Sridevan, for Petitioners.

P. Ananthakrishnan Nair, for Respondent.

The Court delivered the following

JUDGMENT.—This revision has been preferred by the defendants in O.S. No. 82 of 1975 on the file of the Courts of the Subordinate Judge, Nagapattinam. That suit was an under-chapter suit and has been filed by the respondent on the foot that he had obtained an assignment of the suit promissory note from the original promisee.

2. The petitioners herein filed an application under Order 37, rule 2, Civil Procedure Code, praying for unconditional leave to defend the suit. The Subordinate Judge declined to grant unconditional leave and granted them conditional leave by calling upon the petitioners to deposit one-half of the suit amount before entering defence. It is to challenge the correctness of that order the petitioners have come forward with this revision.

3. Mr. Sridevan, the learned counsel for the petitioners states that the Subordinate Judge has found that there is a triable issue in the suit and having rendered such a finding, the learned Judge ought not to have imposed conditions on the petitioners. In support of this contention, he relies upon the decisions in *M/s. Baba Industries* v. *Mehta Traders*[1] and *Raghavaveera Sons* v. *Mrs. Padmavathi*[2]. What has been held in both those cases is that if the Court is satisfied that the defence of the defendant is acceptable though *prima facie* or that the defence raises a triable issue or that the contentions raised by the defendant can only be determined after due trial of the case, then in such circumstances, the Court ought not to impose a condition in the matter of the payment of the plaint amount sought for by the plaintiff into Court as security before the grant of such leave.

4. Mr. Ananthakrishnan Nair, the learned counsel for the respondent submits that in this case, the Court below has not found the existence of any triable issue in favour of the petitioners as contended by them. He points out that the primary contention put forward by the petitioners in the application was that the suit should have been filed within six months from the date of the cause of action and that not having been done, the suit was not maintainable. This contention has been repelled by the Subordinate Judge for there was no trace of material to even remotely sustain this plea. The other ground put forward by the petitioners was that they are agriculturists and, therefore, they are entitled to claim benefits under Ordinance VIII of 1975. It is only with reference to this plea, the Subordinate Judge has observed that since the plaintiff refutes the contention of the petitioners that they are agriculturists, the question of determining the status of the petitioners as agriculturists will have to wait the trial of the suit, but that will not entitle

1. (1977) 2 M.L.J. 479: 90 L.W. 704: A.I.R. 1978 Mad. 146.

2. (1978) 1 M.L.J. 36: 90 L.W. 697: A.I.R. 1978 Mad. 81.

the petitioners to ask for unconditional leave to defend the suit. Inasmuch as the petitioners had not disputed or denied the execution of the promissory note, the Subordinate Judge has directed the petitioners to deposit one-half of the suit claim before entering defence in the suit.

5. On a consideration of the matter, the contention of the petitioners that the Subordinate Judge has found that their claim raised a triable issue for consideration in the suit cannot be sustained. The plea regarding the status of the petitioners as agriculturists will entitle them only to certain benefits in the matter of scaling down of interest etc. It will not impinge upon their liability to pay the amount claimed under the suit promissory note, especially when the petitioners have not denied their liability under the promissory note. Such being the case, it is futile for the petitioners to say that they have raised a triable issue in the case and in view of the acceptance of their stand by the Court below, they should not have been called upon to deposit one-half of the suit amount as a condition precedent. In that view of the matter, the order of the Court below can well be sustained. The revision will, therefore, stand dismissed. No costs.

6. The petitioners are given two months' time from today to deposit the amount directed by the lower Court to be deposited.

R.S. — *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

S. Ramamurthy .. *Petitioner**

v.

The Management of Neyveli Lignite Corporation Ltd., Neyveli, South Arcot District and another .. *Respondents.*

Constitution of India (1950), Article 226—Petitioner employee of Neyveli Lignite Corporation — Charged with theft of article belonging to the Corporation — Domestic enquiry conducted by Plant Engineer — Punishment of dismissal awarded—No proof of alleged stolen article belonging to the Corporation or to any of its employees — Theft held not proved—Plant Engineer not proved to be competent authority to hold enquiry—Punishment of dismissal not upheld.

The petitioner was employed as a store-keeper of the Neyveli Lignite Corporation Limited. On 21st June, 1973 when he was coming out of the factory, his cycle was checked by the watchman and he was taken to the Sainik's room. It was alleged that a brass-screw 1' in length and 1.2 kg. in weight was removed from his cycle, where it had been kept, wrapped in a khaki cloth. A statement was recorded and the petitioner admitted that the rod was found in the khaki cloth and further stated that it was not known how it came to be placed on his cycle. A charge memo. was issued and the petitioner was suspended from service. Subsequently an enquiry was held by the Plant Engineer of the Management. Charges were held to be proved and the petitioner was dismissed from service. The petitioner unsuccessfully preferred appeal as provided for by the Rules and subsequently raised an industrial dispute under section 2-A of the Industrial Disputes Act. The petitioner contended that the Plant Engineer who conducted the enquiry was not the competent authority. But the Labour Court negatived the contention and held that the charges were proved and that the petitioner was not entitled

*W.P. No. 3890 of 1976. 21st June, 1979.

to any relief. On a writ petition by the petitioner,

Held, that according to Standing Order 47 (c) of the Standing Orders which came into force on 31st January, 1971, the employees of the company authorised to hold the proceedings should be specified by the management from time to time. If it was in force on the date of the enquiry in the present case, it was only the Stores Officer, who would have been the competent authority to hold the disciplinary proceedings and award the major punishment of dismissal. But the enquiry had been held and the punishment of dismissal awarded only by the Plant Engineer. No doubt, in the first appellate order it was stated that the Plant Manager or the Plant Engineer was the competent authority to impose the punishment. But it was not stated in that order that the Plant Engineer had been authorised by the Management as required by the Standing Order to hold the enquiry and empowered to award the punishment of dismissal. No doubt in the second appeal memo. the petitioner had not raised this question once again. It is not possible to hold from this circumstance that the petitioner had abandoned his contention, since he had repeated the contention that had been raised in the first appeal. The Management had not produced any record to show that the Plant Engineer who held the enquiry and awarded punishment of dismissal was authorised in that behalf by the Management. The Labour Court's conclusion in the matter is not acceptable. The objection raised by the petitioner that the Plant Engineer has not been proved to be the competent Authority has to be upheld. [*Para.* 6.]

One of the ingredients of the offence of theft is that the property involved must belong to some person and the person alleged to have committed theft in respect of the property must have removed that property. In the absence of any finding at the enquiry that the rod removed from the carrier of the petitioner's cycle when he was leaving the premises of the Management was property either of the Management or of any workman employed under the Management or that it was lying in any workspot or other premises belonging to the company before it was found on the carrier of the petitioner's cycle, it is not possible to hold that the petitioner had committed theft of the rod or an offence of unlawfully removing the rod from any workspot or any premises belonging to the company. The punishment of dismissal awarded to the petitioner was therefore invalid. Accordingly the order of the Labour Court was liable to be quashed. [*Para.* 7.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order dated 24th March, 1976 made in I.D. No. 33 of 1975 from the Presiding Officer, Labour Court, Madras and published at pages 13 to 15 of the Supplement to Part II, section 2 of the Tamil Nadu Government Gazette, dated 5th May, 1976 and quash the order dated 24th March, 1976 and made therein.

R. Ganesan, for Petitioner.

S. Gopalratnam and *N. Balasubramaniam*, for Respondent No. 1.

The Court made the following

ORDER.—This writ petition under Article 226 of the Constitution of India is for the issue of a writ of *certiorari* or any other appropriate writ or order calling for the records in Industrial Dispute No. 33 of 1975 on the file of the Labour Court, Madras and quashing the order dated 24th March, 1976 passed therein.

2. The petitioner was employed as a store-keeper of the first respondent Neyveli Lignite Corporation Limited, Neyveli having entered service as stores assistant in 1966. According to the petitioner, on 21st June, 1973, when he was coming out of the factory of the first respondent, his cycle was checked by the Sainik (Watchman) and he was taken to the Sainik's room. It was alleged that a brass-screw, 1' in length and weighing about 1.2 kg. was removed from his cycle, where it had been kept wrapped in a khaki cloth. The petitioner was taken by the Sainik to the Jamadar and his statement was recorded In the statement he had admitted that the rod was found in the khaki cloth and had stated

that it was not however known how it came to be placed on his cycle. It was his case in that statement that the rod had been planted on the cycle by someone else. A charge memo. was issued on 18th July, 1973 stating that he had committed misconduct as per clauses (*iii*), (*xxiii*), (*xxx*) and (*xxxv*) of Standing Order 46 in the Standing Orders Exhibit M-14 and he was suspended on that date. The petitioner submitted his explanation on 19th July, 1973 saying *inter alia* that there was no evidence to show that the rod was recovered from his possession. It may be stated at this stage that the petitioner had not stated anything in his explanation about his earlier statement recorded on 21st June, 1973 soon after he was taken by the Sainik to the Jamadar. Subsequently, an enquiry was held and two sainiks were examined on the side of the management and three witnesses were examined on the side of the petitioner herein. The enquiry officer, the Plant Engineer of the Management, found in his report Exhibit M-5, that the charge was proved. A second show cause notice was issued to the petitioner on 10th September, 1973 and he submitted his reply, Exhibit M-8 saying *inter alia* that it had not been established in the enquiry that the rod belonged to the first respondent. He had taken this stand regarding the ownership of the rod even in his first appeal memo. Exhibit M-10. However, the same Plant Engineer, who held the enquiry, dismissed the petitioner from service by his order Exhibit M-9 dated 26th October, 1973. As provided by the service rules, the petitioner filed an appeal under Exhibit M-10 to the first appellate authority *viz.*, the Deputy Superintendent, Mechanical Division, on 12th November, 1973 and it was dismissed by the order, Exhibit M-11 dated 3rd January, 1974. The petitioner further appealed as per Exhibit M-12 dated 17th January, 1974 to the Superintendent, Production Fertilizer, who dismissed the same by his order Exhibit M-13 dated 1st February, 1974. Subsequently, the petitioner raised an industrial dispute under section 2-A of the Industrial Disputes Act, 1947, alleging *inter alia* in his claim statement that the statement dated 21st June, 1973 was obtained by coercion and that he was not furnished with a copy of the sainik's report to the management. The petitioner further contended that the Plant Engineer who passed the order of dismissal, Exhibit M-9 was not the competent authority and that the order is therefore invalid.

3. The first respondent contended in the counter-statement before the Labour Court that the petitioner was found to be in unauthorised possession of a brass screw one foot in length and weighing about 1.2 kgs. rolled in a khaki cloth and kept in the carrier of his cycle and he had voluntarily given a statement on the same date to the security personnel admitting his possession of the brass-screw covered in a khaki cloth. It is further stated in the counter-statement that the petitioner had been given all opportunities to defend himself and the finding of the enquiry officer is based upon sufficient evidence placed before him. It is further stated in the counter-statement that the Plant Engineer was the competent authority to award the punishment of dismissal for misconduct.

4. No witness was examined on either side before the Labour Court. The Labour Court found that the enquiry was fair and no prejudice was coused by the failure on the part of the management to furnish a copy of the sainik's report, to the petitioner. The Labour Court further found that the allegation that the statement dated 21st June, 1973 was obtained by coercion is an afterthought and it relied mainly on that statement Exhibit M-4 and found that the misconduct had been proved without however recording a finding as to the ownership of the rod about which nothing has been stated in the enquiry report and held that the punishment of dismissal was proper having regard to the prior punishment as can be gathered from the petitioner's service register Exhibit M-15. Accordingly the Labour Court found that the non-employment of the petitioner was justified and that he was not entitled to any relief and directed the parties to bear their respective costs.

5. The petitioner has admitted in his statement Exhibit M-4 dated 21st June, 1973 that the brass rod, one foot in length and weighing 1.2 kgs. wrapped in a khaki cloth was found on his cycle. Having regard to the fact that in his explanation submitted to

the charge memo, he has not even whispered that the statement Exhibit M-4, had been obtained from him by coercion, there is no reason to differ from the Labour Court that the contention put forward in the claim statement that the statement had been obtained by coercion is an afterthought. Having regard to the evidence of the sainiks produced before the enquiry officer and the statement Exhibit M-4 it has to be held that it has been proved in the enquiry that the brass rod one foot in length and weighing 1.2 kgs. was found wrapped in a khaki cloth placed on the cycle of the petitioner when he was leaving the premises of the factory on 21st June, 1973. The petitioner has not substantiated his case that the brass rod had been planted by someone on his cycle. There is no material on record from which it can be held that the enquiry was not fair or any serious prejudice has been caused to the petitioner by the copy of the report of the sainik not having been furnished to him. However, it may be stated that neither the original nor any copy of the alleged report of the sainik has been made available before even the Labour Court inspite of the petitioner's complaint that he had not been provided with a copy of that report. It would have been in the interests of justice if either the original report which must have been available in the custody of the management or a copy thereof had been produced at least at the enquiry before the Labour Court.

6. Two contentions were raised before me by learned counsel for the petitioner. The first is that the rod wrapped in a khaki cloth, found on the cycle of the petitioner when he was leaving the factory premises on 21st June, 1973, has not been proved to be the property of the management or of any other person of the factory. The second objection is that the Plant Engineer who conducted the enquiry and awarded the punishment of dismissal to the petitioner is not the competent authority. If it is found that the Plant Engineer is not the competent authority, and that it is the only irregularity the matter will have to go back for fresh enquiry by the management. It is therefore desirable to deal with that question first. The punishment of dismissal awarded to the petitioner is undoubtedly, a major punishment. Standing Order 47 in the Standing Orders Exhibit M-14, deals with punishments for misconduct and Standing Order 47 (*a*) (iii) under the heading, "major punishments", shows that dismissal from service without notice or pay/wage in lieu of notice is a major punishment. It is laid down in that Standing Order that the management or the employee of a company authorised in this behalf may, at its or his discretion, institute an enquiry against a workman before imposing on him any of the minor punishments. No order imposing any major punishment shall be made except after holding an enquiry against the workman concerned in respect of the alleged misconduct. In the first appeal, Exhibit M-10 also the petitioner had questioned the competency of the Plant Engineer for awarding the punishment of dismissal. It was submited by the learned counsel for the 1st respondent that proceedings No. 502 (E. & G.) of 1966 dated 26th August, 1966 were placed before the Labour Court for its perusal. That is found in the bundle of papers submited to this Court by the Labour Court. It is seen from Appendix II to those proceedings that so far as the industrial unit is concerned, the Plant Manager or the Plant Engineer is the disciplinary authority in the case of major punishments to employees in the industrial unit, and that the Deputy Superintendent or the Deputy Chief Engineer is the first appellate authority and the Chief Engineer or the Superintendent is the second appellate authority and that in the case of employees in the Stores, the Stores Officer, the Material Controller and the Controller of Stores and Purchases are the disciplinary authority, the first appellate authority and the second appellate authority, respectively. According to Standing Order 47 (*a*) of the Standing Order Exhibit M-14, which came into force on 31st January, 1971, the employees of the company authorised in this behalf shall be specified by the management from time to time. If the aforesaid appendix to the proceedings dated 28th June, 1966 was in force on the date of the enquiry in the present case, it was only the Stores Officer who would have been the competent authority to hold the disciplinary proceedings and award the major punishment of dismissal. But the enquiry has been held and the punishment of dismis-

sal has been awarded, as stated earlier, only by the Plant Engineer. No doubt, in the first appellate order it is stated that the Plant Manager or the Plant Engineer is the competent authority to impose the punishment of dismissal. But it is not stated in that order that the Plant Engineer had been authorised by the Management as required by Standing Order 47 (*c*) in Exhibit M-14 to hold the enquiry and empowered to award the punishment of dismissal. No doubt, in the second appeal memo. Exhibit M-12, the petitioner has not raised this question once again. It is not possible to hold from this circumstance alone that the petitioner has abandoned this contention, for he has repeated that contention which had been raised in the first appeal, Exhibit M-10 even in the claim statement filed before the Labour Court. The Management has not produced any record to show that the Plant Engineer who held the enquiry and awarded the punishment of dismissal has been authorised in this behalf by the management. Therefore, it is not possible to agree with the Labour Court that the Plant Engineer who conducted the enquiry and awarded punishment of dismissal has been proved to be the competent authority as per the Standing Orders of the first respondent. Under the circumstances mentioned above, I uphold the objection raised by the petitioner that the Plant Engineer has not been proved to be the competent authority and that the punishment of dismissal awarded by him to the petitioner cannot be upheld. If my finding on the question of the necessity to prove the ownership of the brass rod seized from the petitioner's cycle on 21st June, 1973 is not in favour of the petitioner, the matter with regard to the competency of the enquiry officer to hold the enquiry and award any punishment to the petitioner has to go back to the management.

7. The recovery of the brass rod wrapped in a khaki cloth from the petitioner's cycle has not been disputed. The brass rod has not been produced either at the domestic enquiry or before the Labour Court. The relevant portion of the charge memo. Exhibit M-1 issued to the petitioner is as follows:

> "It has been reported that Sri. S. Ramamurthy working as Store-keeper Grade, C. Mechanical Division II of the Fertiliser Factory in the Lignite Project at Neyveli under the control of the Neyveli Lignite Corporation Ltd., has committed the following acts or omissions which are misconduct falling under sub-clauses (*iii*), (*xxiii*), (*xxx*) and (*xxxv*) of Standing Order No. 46;"
>
> "That on 21st June, 1975 at about 16 hours, Sri. S. Ramamurthy, Store-keeper Grade-C, working in Mechnical Division II of the Fertiliser Factory was found to be in possession of a brass screw about one foot in length and weighing 1.2 kgs. in a khaki cloth rolled in his cycle carrier, when the security personnel at the Fertiliser East Gate were checking the employees going out of the plant on completion of their general shift duty."

Clause (*iii*) of the Standing Order No. 46, in Exhibit M-14 mentions theft, fraud or dishonesty in connection with the company's business or property as a misconduct. Clause (*xxiii*) mentions unauthorised use of any property, machinery tool, quarter or land belonging to the company as misconduct. Clause (*xxx*), mentions theft of property belonging to any other workman, or from any of the workspots, or any premises belonging to the company, and clause (*xxxv*) mentions any act or omission punishable according to law as a misconduct. The charge memo, did not say that the brass rod belonged to either the company or any workman of the company or that it had been picked up from any workspot or any premises belonging to the company. One of the ingredients of the offence of theft is that the property involved must belong to some person and the person alleged to have committed theft in respect of that property must have removed that property. In the absence of any finding at the enquiry that the rod removed from the carrier of the petitioner's cycle when he was leaving the premises of the factory on 21st June, 1973 was the property either of the management or of any workmen employed under the management or that it was lying in any workspot or within any premises belonging to the company before it was found on the carrier of the petitioner's cycle, it is not possible to hold that the petitioner had committed theft of the rod or offence of unlawfully removing the rod from any workspot or any premises belonging to the company. Notwithstanding the fact that the petitioner had raised this

question of ownership of the rod not only in his reply, Exhibit M-8 to the second show-cause notice, but also in the first appeal memo. Exhibit M-10, the management has not made any attempt even before the Labour Court to establish that the brass rod belonged to the management or any of the workmen or that it was lying in any workspot or any premises belonging to the company before it was found wrapped in a khaki cloth on the carrier of the petitioner's cycle on 21st June, 1973. It is not possible to agree with the learned counsel for the first respondent that this question cannot be gone into this writ petition on the ground that the question of ownership of the brass rod had not been raised either in the claim statement filed in the Labour Court or in the affidavit filed in support of this writ petition, for that point is an important point which has to be established by the management before the petitioner could be said to have committed theft of the property belonging to the management or any of its workmen or to have unlawfully removed the property from the workspot or any of the premises of the company, especially when that question has been raised at the earliest stage of the enquiry, *viz.*, in Exhibit M-8, the petitioner's reply to the second show-cause notice, as well as in the first appeal memo. Exhibit M-10. In the absence of any finding either in the domestic enquiry or before the Labour Court that the brass rod was the property of either the management or any of the workmen or that it was lying in any workspot or in any premises of the company it is not possible to hold that the management has proved any offence of theft alleged against the petitioner. The punishment of dismissal awarded to the petitioner is therefore invalid. Accordingly, the order of the Labour Court, dated 24th March, 1976 passed in I.D. No. 33 of 1975 is quashed and the writ petition is allowed with costs. Counsel's fee Rs. 250.

R.S. —— *Writ Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

Boopathy .. *Appellant**

v.

Dharmalingam alias **Perumal and others.** .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 11 —Res judicata—*Principles—Applicability.*

The present suit was laid on the basis that the suit properties (five items) originally belonged to *A*, who had four sons, *R*, *K*, *A* and *N*. After the death of '*A*' the four sons enjoyed the properties as an undivided family and no partition was effected. The first son of '*A*' died leaving behind his son '*G*' who also died and the 10th defendant was the son of '*G*'. The third son of '*A*' died leaving behind his sons, defendants 8 and 9. The fourth son of '*A*' died leaving behind his son '*D*' who died issueless. '*D*' had executed a will dated 25th August, 1941. A sale of one item of property was made by 10th defendant to the 11th defendant. The plaintiff was the son's son of *K*, the second son of *A*. A suit for partition was filed by defendants 1, 8 and 9 and the father of the plaintiff, alleging that the sale deed executed by the 10th defendant was not binding on them. The suit was dismissed by the Trial Court. The Appellate Court decreed the suit in A.S. No.347 of 1968 allotting one-third share to each of the three branches, namely of the first three sons of *A*. It was claimed in the present suit by the plaintiff that the decree passed in A.S. No.347 of 1968 was not binding in respect of the property bequeathed to him by '*D*' under his will and that he was entitled to a decree for partition of the properties into 4 shares and the 1/4th share bequeathed by *D* should be allotted to him apart from the share to which he will be entitled to as heir through *K*, the second son of *A*. The suit was resisted *inter alia* on the ground that the decision in the earlier suit which was also one for partition wherein an one-third share had been allotted to the share of the plaintiff's branch operated as *res judicata* barring the present claim for a larger share by virtue of a will which was very much within his knowledge at the time when the earlier proceedings were initiated.

* A.A.O. No. 33 of 1977. *23rd March,* 1979

Held, that in the earlier suit, it was claimed that each one of the branches will be entitled to one-third share whereas in the present suit it is claimed that each one of the branches will be entitled to a one-fourth share. The only other follow-up claim made by the plaintiff in the present suit was that the share which was allottable to the branch of the fourth son and his son *D*, should be given to the plaintiff as the legatee under the will. He had not filed the present suit for any other relief except to ask for one-fourth share in the suit properties. He had chosen to file the present suit having been fully aware of the earlier proceeding. It was the plaintiff's father who instituted the earlier suit and it was the plaintiff who contested the matter in the appellate stage. They were aware of the existence of the will. Equally they were aware of the existence of the 4th branch. Therefore when all these factors were available before the Courts in the earlier proceedings, it cannot be said that the question as to what share each branch of '*A*' would be entitled to had not been finally decided in the earlier proceedings. [*Para.* 13.]

The shares having been correctly decided, it will not be open to the plaintiff to institute the present suit claiming that the share can be only one-fourth to each one of the branches and not one-third share as decided in the earlier suit. Hence it has to be held that the matter which is involved in the present suit relating to the allotment of shares to the respective branches of '*A*' had been finally decided in the earlier proceedings. Therefore, the lower appellate Court was not correct in holding that the present suit is not hit by the principles of *res judicata*. [*Para.* 14.]

Cases referred to:—

Nalini Kanta Lahiri v. *Satnamayji Debya*, (1914) 27 M.L.J. 76: 1 L.W. 607: 41 I.A. 247: A.I.R. 1914 P.C. 31; *Parsotam Rao Tantia* v. *Radha Bai*, I.L.R. (1910) All. 469; *Banakana Basava Gowd* v. *Banakara Doddalingappa*, (1923) 44 M.L.J. 552; *Katragadda Venkatasubbayya* v. *Katragadda Virayya*, (1956) An. W.R. 1082; *Chandra Kant* v. *Balakrishna*, A.I.R. 1970 S.C. 1536; *K. Daniel Nadar* v. *R. Ananthan Pillai*, (1978) M.L.J. 125; *Syed Mohd S. Labhai* v. *Mohd. Hanifa*, (1976) 4 S.C.C. 780: (1976) 3 S.C.R. 721: A.I.R. 1976 S.C. 1569.

Appeal against the order of the Principal District Court Pondicherry dated 21st October, 1976 and made in A.S. No. 198 of 1975 (O.S. No.33 of 1973) II Additional District Munsif Court, Pondicherry).

R.S. Venkatachari, for Appellant.

R. Shanmugham and *A. U. Ilango*, for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is preferred against an order of remand made by the lower appellate Court in A.S. No. 198 of 1975 which decided the preliminary issue on the aspect of *res judicata* that was pleaded before the trial Court, which dismissed the suit as barred by *res judicata* by its judgment dated 23rd October, 1975. The lower appellate Court remanded the matter for fresh disposal after deciding the preliminary point in favour of the plaintiff-appellant. The present suit was laid on the basis that the suit properties which consist of five items of landed properties belonged originally to one Ayyam Perumal Gounder who had four sons, Ramasami, Krishnan, Adhimoolam and Narayanasami and that the plaintiff is the son of Arumugam *alias* Ramasami, son of Krishnan. After the death of Ayyam Perumal, his four sons enjoyed the properties as an undivided one and that no partition was effected between the four brothers. The first son of Ayyam Perumal, namely Ramasami died leaving behind Govindasami, his only son, who also died leaving behind the 10th defendant. The third son Adhimoolam is also dead and defendants 8 and 9 are his grand-sons. Narayanasami, the 4th son of Ayyamperumal died leaving behind him his son Duraisami, who died issueless. Duraisami executed a will dated 25th August, 1941. 10th defendant had sold one item of the suit properties to the 11th defendant. Therefore defendants 1, 8 and 9 and father of the plaintiff filed a suit for partition of the suit properties claiming that the sale deed dated 2nd July, 1960 executed by the 10th defendant is not binding upon them and that they are entitled to a decree for partition. The trial Court dismissed the suit whereas the appellate Court in A.S. No. 347 of 1968 decreed the suit by its judgment dated 23rd November, 1971 allotting one-third share to each of the branches of Ramasami, Krishnan and Adhimoolam. Therefore it is pleaded that the plaintiff claimed in the present suit that the decree passed in A.S. No. 347 of 1968 is not binding upon him in respect of the property that has been bequeathed by Duraisami under will dated 25th August, 1941 and that

he is entitled to a decree for partition of the properties into four equal shares and one-fourth share bequeathed by Duraisami should be allotted to him apart from the share to which he will be entitled to as a heir through Krishnan.

2. The suit was resisted on several grounds and the main ground taken was that the plaintiff cannot institute the present suit in view of the decree obtained in A.C. No. 347 of 1968 which was also a suit filed for partition wherein a one-third share had been declared in respect of the branch of Krishnan and it is not open to the plaintiff to institute the present suit in respect of the same properties claiming relief of partition and at the same time to claim that he is entitled to a larger share by virtue of a will which was very much to his knowledge at the time when the earlier proceedings were instituted and hence the suit deserves to be dismissed.

3. The trial Court which was called upon to decide the preliminary issue relating to *res judicata* held that the present suit in respect of the same properties claiming the relief of partition which was the same relief asked for in the earlier suit is clearly barred by *res judicata*, even though it is sought to be contested that the present relief is rested upon a will and that on that basis a larger share is to be allotted to the plaintiff herein.

4. The lower appellate Court, came to the contrary conclusion on four grounds. (1) the subject-matter in the present suit is not identical to the subject-matter that was agitated in the earlier proceedings in that the question whether the plaintiff is entitled to a share as a legatee of Duraisami, representing the 4th branch, was never considered; (2) The plaintiff herein was impleaded in the earlier proceedings only at the appellate stage, as the heir of his father Krishnan, and not in his capacity as a legatee under the will of Duraisami; (3) The question is whether there was a 4th branch for Ayyam Perumal which was never considered in the earlier proceedings; (4). The main question that came up for consideration in the earlier suit was whether the alienation made by the 10th defendant in favour of the 11th defendant by sale deed dated 2nd July, 1960 was binding on the family or not and therefore it held that the present suit is not hit by the principles of *res judicata* and therefore remanded the matter to the trial Court to be disposed of on merits.

5. Counsel for the appellant herein contends that even though the lower appellate Court had tried to list out four points, all of them do not deserve any consideration because the lower appellate Court had committed the basic error in failing to bear in mind that the present suit is also a suit for partition and for allotment of one-fourth share of the properties of Ayyamperumal. He refers to the reliefs claimed in the plaint wherein the plaintiff has asked for "to put plaintiff in possession of the one-fourth share after passing a final decree in pursuance of the terms of the preliminary decree". It is not in dispute that the 5 items of landed properties which formed the subject-matter of the present suit, are identical to the items of properties, covered by the earlier suit. The plaintiff was no doubt impleaded in the earlier proceedings, as an appellant in the appellate stage. His father died and the appellate Court held that the plaintiff will be entitled to one-third share of the suit properties. Having been a party to a proceeding wherein plaintiff had the benefit of getting one-third share of the suit properties, the aspect that requires to be considered is whether at a later stage it is open to the same plaintiff to come before Court in respect of the same properties stating that there are four branches in the family and that each one will be entitled to one-fourth share and so far as he is concerned, he will be entitled to a further one-fourth share as a legatee of one of the sharers. The lower appellate Court, has proceeded on the basis that the subject-matter of the present proceedings is quite different from the subject-matter of the earlier proceedings in that, the present claim is based on the question whether as a legatee of Duraisami, the plaintiff can claim a share. It should not be forgotten that it was the plaintiff's father who instituted the earlier proceedings and the parties were aware that Ayyemperumal had four sons and that the 4th branch of Narayanasami was extinct by that time. In the judgment delivered in A.C. No. 347 of 1968 reference is made to the effect that Ayyamperumal had four sons, and that Narayanasami was the 4th son. It was made out that Narayanasami and his son Duraisami had died by that time. In that judgment, it is stated as follows:

"In the present case, the plaintiffs were not able to produce the birth certificates of the sons of Ayyamperumal, that is, the

birth certificates of Ramasami, Krishnan Adimoolam and Narayanasami"......

"In the instant case, the appellants have produced the death certifieates of the above persons except that of Rangasamy who is said to have died leaving his only son Doraisami who is also stated to have died issueless."

Therefore even in the earlier proceedings, it was very much to the knowledge of the parties that Narayanasami was one of the sons of Ayyam Perumal, and that his son Doraisami was also not alive by the time the suit was institu ed. Hence, the appellate Court in A.C. No 347 of 1968 had come to the conclusion that the estate of Ayyamperumal after his death can be divided only into three shares and the plaintiff was allotted a one-third share. That being so, it cannot now be contended by the respondents herein that the subject-matter of the present suit for partition wherein a one-fourth share is claimed out of the estate of Ayyamperumal; is nothing differnt from the earlier suit for partition. The present suit is also one for partition and separate possession and does not seek any other relief except to base the claim on the basis that Duraisami has left behind a will and his share is also to be taken by the plaintiff as a legatee under the will. It may be that the plaintiff may be attempting to get at a larger share but the basis of the present suit is only to seek for division of the properties of Ayyamperumal and allot one fourth share to each branches whereas the earlier suit was also a suit for partition to allot one-third share to each one of the branches.

6. The second point taken was that the plaintiff was impleaded only in the appellate stage as the legal representative of his father and not as a legatee. The claim made by the plaintiff herein is that the one-fourth share which is allottable to the branch of Narayanasami and his son Duraisami, is also to be allotted to him. During the earlier proceedings, plaintiff's father and the plaintiff in the appellate stage were quite aware of the existence of the branch of Narayanasami and they had not chosen to make any claim about the existence of the will and ask for a different computation of shares for the four branches Ayyamperumal. There is no question of the plaintiff claiming in the capacity of legatee, when this suit is based for partition and allotment of one-fourth share. It cannot therefore be contended that the matter to be decided between the parties is nothing different from what had been decided earlier except for the limited point now taken that there was a will left behind by Doraisami in respect of his share in the joint family properties. This will be only incidential to the question of division of shares in the joint family of Ayyamperumal and whereas a civil Court had come to the conclusion that at the relevant point of time, there were only three branches, and when a decree had been passed accordingly, the persons who are entitled to get at the properties through such division, are bound by the earlier decree and hence the principles of *res judicata* will become applicable.

7. The next aspect that was taken into consideration by the lower appellate Court that in the earlier suit, the existence of the 4th branch was not at all at issue, cannot be correct in view of the extracts which have been made above from and out of the earlier judgment. Parties were quite aware of Ayyamperumal having a 4th son by name Narayanasami who had died leaving behind him, his son Doraisami who had also died issueless by the time the earlier proceedings were instituted.

8. Counsel for the appellant, relies upon the decision reported in *Nalini Kanta Lahiri* v. *Sarnamoyi Debya and others*[1] to the effect that partitions being by judicial decrees it decides the shares of each co-sharer and in such a suit, each one of them is in the position of a plaintiff and a decree made in a partition suit can be rectified only under the provisions of the Civil Procedure Code and there being no irregularity made out the earlier decree will act as *res judicata* between co-defendants. In this case, parties to the earlier proceedings were aware that there was a fourth branch of Ayyamperumal. But it had become extinct by the time, the suit for partition was laid. Hence even if it is a question of any error in respect of the quantification of shares it could only be rectified by resorting to the provisions of Civil Procedure Code to correct the earlier decree, and there can be no question of a fresh suit being laid as is now sought to be done, and hence the decision in the earlier suit will act as *res judicata*.

9. The next decision relied upon is *Parsotam Rao Tania* v. *Radha Bai*[2] wherein

1. (1914) 27 M.L.J. 76: 1 L.W. 607: 41 I.A. 247: A.I.R. 1914 P.C. 31.
2. I.L.R. (1910) All. 469.

it has been held that when in a suit for partition all the members of the family were impleaded as parties and the suit had been finally decided, it will not be open to one of the defendants of the suit to reopen the question about the right as against a co defendant in a subsequent suit. In that decision, it is seen that on the basis of a will, the latter suit had been instituted for reallotment of shares. But taking into account the fact that the parties to the dispute were parties in the earlier proceedings, it was held that the said will cannot form the basis for any right to reagitate the matter once again when finality had been reached in the earlier proceedings.

10 The next division referred to by him, was the one rendered in *Banakara Basavana Gowd* v. *Banakara Doddalingappa*[1], wherein the scope of section 11, *Explanation* 4 and sections 16 and 17, Civil Procedure Code, came up for consideration and it was held that in a suit for partition of the ioint family properties when shares have been ascertained, it is settled law that only one suit for partition would lie and there could be no question of filing different suits in respect of different items of properties in different Courts. Learned counsel for the appellant further relies upon the decision rendered in *Katragadda Venkatasubbaya* v. *Katragadda Virayya*[2], wherein this aspect has been well considered and the division bench had come to the conclusion that in the absence of fraud, a prior decree for partition like any other decree operates as *res judicata* and in a suit for partition of the joint family proplrties. Order 2, rule 2 will be applicable between the co-sharers as well as between coparceners. If there was any mistake in respect of the earlier proceedings, it can always be rectified but it will not form the basis for the filing of a fresh suit for the same relief.'

11. The decision rendered in *Chandra Kant* v. *Balakrishna*[3], lays down the proposition that if it be shown that the plaintiff has acted upon an award or a preliminary decree which had not been properly pursued with later on for a considerable number of years (in that case 35 years) then the decision rendered earlier will preclude him from filing the second suit for partition claiming a larger share. It was a case where the previous suit for partition got dismissed for failure to deposit the Commissioner's fee, but the parties divided the properties and had acted upon the same for more than three decades. Taking into account that the shares of the members of the joint family had been determined in the earlier proceedings, it will not be open to any one of them, to later on file a second suit partition in respect of the same subject-matter. Counsel for the appellant further relies upon the decision of this Court in *K. Daniel Nadar* v. *R. Anantham Pillai*[1], which had relied upon the propositions that had been enunciated in the decisions above referred to and held that under circumstances like the present one, there cannot be a second suit for partition in respect of the same subject-matter between the same parties.

12. Counsel for the respondents would refer me to the decisions rendered in *Syed Mohd. S. Labbai* v. *Mohd. Hanifa*[2] wherein the essential principles that should be borne in mind for assessing the plea of *res judicata* had been made out. It has been held therein that before a plea of *res judicata* can be given effect to, the following conditions must be proved:

1. The litigating parties must be the same.

2. The subject-matter of the suit also must be identical;

3. The matter must be finally decided between the parties; and

4. The suit must be decided by a Court of competent jurisdiction.

In this case, it is not in dispute that the dispute is between the same parties and the subject-matter is identical (the same five items as in the previous suit) and that the suit had been finally decided by a competent Court.

13. It is contended that the third aspect relating to the question as to whether the matter had been finally decided between the parties, is not satisfied in this case. As pointed out earlier the contention is that the question as to whether, as a legatee of Duraisami, the plaintiff can get a share, is not identical to the claim made in the earlier suit for partition

1. (1923) 44 M L J 552.
2. 1956 An. W.R. 1082.
3. A.I.R. 1970 S.C. 1536.

1. (1978) 1 M.L.J. 125.
2. 1976 4 S.C.C. 780: (1976) 3 S.C.R. 721: A.I.R. 1976 S.C. 1569.

and separate possession. I do not think that this contention will be open to the respondents herein that both the suits have been filed for partition and separate possession of the properties of the estate left behind by Ayyamperumal Gounder. In the earlier suit, it was claimed that each one of the branches will be entitled to one-third share whereas in the present suit it is claimed that each oneof the branches will be entitled to a one-fourth share. The only other follow-up claim made by the plaintiff in the present suit is that the share which is allottable to the branch of Narayanasami and his son Duraisami, should be given to the plaintiff as a legatee under the will. He has not filed the present suit for any other relief except to ask for one-fourth share in the suit properties. The relief asked for in the plaint has been extracted above He has chosen to file the present suit having been fully aware of the earlier proceedings about which reference is made in the plaint itself. It was the plaintiff's father who instituted the earlier suit and it was the plaintiff who contested the matter in the appellate stage. They were aware of the existence of the will. Equally they were aware of the existence of the 4th branch. Therefore when all these factors were available before the Courts in the earlier proceedings, it cannot be said that the question as to what share each branch of Ayyamperumal Gounder would be entitled to had not been finally decided in the earlier proceedings.

14. The shares having been correctly decided, it will not be open to the plaintiff to institute the present suit claiming that the share can be only one-fourth to each one of the branches and not one-third share as decided in the earlier suit. Hence it has to be held that the matter which is involved in the present suit relating to the allotment of shares to the respective branches of Ayyamperumal had been finally decided in the earlier proceedings. Therefore, the lower appellate Court was not correct in holding that the present suit is not hit by the principles of *res judicata*. Hence the appeal is allowed and the present suit is dismissed as barred by *res judicata*. No costs.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*A. Varadarajan, J.*

M. Dakshinamurthi Gurukkal .. *Petitioner**

v.

The State of Tamil Nadu represented by the Secretary to the Government of Tamil Nadu, Commercial Taxes and Religious Endowments Department, Madras, and others .. *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), section 56 (1)—Petitioner hereditary murai archaka in temple—Suspended by Executive Officer and charges framed—Denial of charges by petitioner—Petitioner unwilling to participate in enquiry—No oral evidence let in—No proof regarding passing of Resolution by the Board of Trustees—No finding that charges were proved—Order indicating that Executive Officer had already decided to dismiss petitioner—Dismissal of petitioner by Executive Officer—Violative of the principles of natural justice—Order of dismissal not in compliance with the provisions of the Act and therefore liable to be quashed.

The records in the instant case showed that the petitioner (hereditary murai archaka in a temple) had expressed his unwillingness to appear at the enquiry against him on 11th January, 1972. But since it was admitted that the petitioner had not admitted in his explanation, any of the charges framed against him, it was incumbent upon the Board of Trustees to hear the oral evidence in support of the charges framed against the petitioner notwithstanding the fact that he had not chosen to appear at the enquiry held on 11th January, 1972 and come to conclusion that the charges had been proved. The oral evidence not having been heard, rule 2 of the Rules framed under section 56 of the H.R.& C.E. Act had not been complied with. Moreover, the order dated 11th April, 1972 of the Executive Officer did not in terms state that the charge had been proved. Since the alleged resolution dated 11th January, 1972 of the Board of Trustees had not been produced and it had been only contended in the counter-affidavit of respondents 1 to 3 that it was not necessary

*W.P. No. 779 of 1976. *5th March, 1979.*

that the order of dismissal should be accompanied by that the resolution of Board of Trustees and it was open to the petitioner to obtain a certified copy of the resolution, it had to be held that the respondents had not proved that any resolution was passed by the Board of Trustees on 11th January, 1972 for removing the petitioner from service. Moreover, the order of suspension with effect from 26th April, 1971 itself showed that the Executive Officer had decided on 20th April, 1971, itself that the petitioner should be dismissed, for that order said that he was being suspended from 26th April, 1971, till his dismissal from service by further order. Therefore, the principles of natural justice had not been complied with in this case, no proper enquiry had been held before the petitioner was removed from service the order of dismissal passed by the Executive Officer of the Devasthanam was not in compliance with section 56 (*i*) of the Act and the petitioner was therefore, entitled to the relief prayed for in the writ petition. The writ petition was accordingly allowed with costs. [*Para.* 5]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records on the file of the first respondent herein, State of Tamil Nadu represented by the Deputy Secretary, Commercial Taxes and Religious Endowments, Madras in G.O. No. 22 and dated 8th January, 1975 and in confirming the order of removal from service made by the 5th respondent and as confirmed by the orders of respondents 2 and 3 and quash the proceedings.

R.S. Venkatachari, for Petitioner.

S. Ramalingam, for Government Pleader for Respondents 1 to 3.

W.C Thiruvengadam, for Respondent No. 5.

The Court made the following

ORDER.—This writ petition, under Article 226 of the Constitution of India, is for the issue of a writ of *certiorari* or any other appropriate writ or direction calling for the records of the first respondent in G.O. Ms. No. 22 Commercial Taxes and Religious Endowments Department dated 8th January, 1975, confirming the order of removal of the petitioner from service made by the fifth respondent, the Executive Officer of Sri Subramaniaswami Temple, Vallimalai, North Arcot District as confirmed by the orders of respondents 2 and 3 and for quashing the same as illegal, incompetent and without jurisdiction.

2. The petitioner is a hereditary Miras Archaka in Sri Subramaniaswami Temple, Vallimalai in North Arcot District for over thirty years. According to the practice and custom in the temple in regard to emoluments and perquisites of the Archaka, the petitioner should be paid 50 per cent. of archana fees collected by the temple authorities by issue of archana tickets for the service rendered by him. He was suspended by the fifth respondent, the Executive Officer of the Devasthanam by order dated 20th April, 1971 with effect from 26th April, 1971 "till he was dismissed from service by a further order". The petitioner was dismissed by the Executive Officer by his order dated 11th April, 1972, on the ground that his *explanation* was not acceptable and the reason given by him for his absence in the enquiry said to have been held on 11th January, 1972, was not acceptable. The appeal preferred by the petitioner before the Deputy Commissioner, Hindu Religious and Charitable Endowments against the order of the Executive Officer removing him from service was dismissed on 1st August, 1973. The revision petition filed by the petitioner before the Commissioner, Hindu Religious and Charitable Endowments, Madras against the order of the Deputy Commissioner was dismissed on 15th October, 1973, and the further revision preferred by the petitioner against the Commissioner's order was rejected by the Government by G.O. Ms. No. 22, Commercial Taxes and Religious Endowments Department dated 8th January, 1975.

3. The petitioner's case is that the Executive Officer has passed the order of dismissal and he has no right to do so, though he has power to suspend the servants of the temple, that no enquiry was held prior to the order of dismissal from service made on 11th April, 1972, and that the procedure prescribed in section 56 (1) of the Tamil Nadu Act XXII of 1959 has not been followed, that is to say, the order of dismissal from service has not been made by the Board of Trustees of the temple. The petitioner has prayed for

quashing the order of the first respondent confirming the orders of other respondents 2, 3 and 5 for the aforesaid reasons.

4. Respondents 1 to 3 contend that the allegation that no enquiry was held is false and that the orders of suspension and dismissal were passed only by the Board of Trustees of the temple and were merely communicated by the Executive Officer of the temple. They further contend that it is not necessary that the order of dismissal should be accompanied by a resolution of the Board of Trustees and that it is open to the petitioner to obtain a certified copy of the resolution of the Board of Trustees. It is further contended that the petitioner had expressed his unwillingness to appear at the enquiry on 11th January, 1972, and that the Board of Trustees have unanimously resolved to remove the petitioner from service and the decision to remove him from service has been m rely communicated by the Executive Officer.

5. The order dated 11th April, 1972, of the fifth respondent removing the petitioner from service with effect from 13th April, 1972, no doubt says that the Board of Trustees have unanimously resolved on 11th January, 1972, to remove the petitioner from service. The alleged unanimous resolution dated 11th January, 1972, of the Board of Trustees to remove the petitioner from service has not been produced. There is nothing on record to show that the order to remove the petitioner from service has itself been made by the Board of Trustees, though as stated earlier, the Executive Officer's order dated 11th April, 1972, refers to the unanimousresolution dated 11th January, 1972 of the Board of Trustees to remove the petitioner from service. A perusal of the Executive Officer's order dated 11th April, 1972, shows that the resolution to remove the petitioner from service is by the Board of Trustees and that the order to remove the petitioner from service in pursuance of that resolution is by the Executive Officer. Section 56 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 lays down that "all office-holders and servants attached to a religious institution or in receipt of any emoluments or perquisite therefrom shall be controlled by the trustee and the trustee may, after following the prescribed procedure, if any, fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of orders, neglect of duty, misconduct or other sufficient cause." A perusal of the order of suspension itself shows that it has been made only by the Executive Officer and not by the Board of Trustees. It is also stated in that order thus:

> "It is hereby ordered that you are suspended from doing archakam service and receiving all your share of income, *i.e.*, from 26th April, 1971, till you are dismissed from the service by further order."

This order shows that the Executive Officer had already decided to dismiss the petitioner from service even while suspending him from service with effect from 26th April, 1971 and without holding any enquiry which had not been held by that date. It is admitted that the petitioner had not admitted any of the charges framed against him and it is stated that his *explanation* was not accepted. Rule 2 of the Rules framed in exercise of the powers conferred by section 56 of the aforesaid Act in S.R.O. No. A-584 of 1960 is *inter alia* to the effect that "an oral enquiry shall be held if such an enquiry is desired by the person charged or is decided upon by the trustee and at that enquiry, oral evidence shall be heard as to such of the allegations as are not admi ted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses, called as he may wish, provided that the trustee may, for special and sufficient reasons to be recorded in writing, refuse to call a witness or require the delinquent to hear the expenses of such witnesses." No doubt, the records show that the petitioner had expressed his unwillingness to appear at the enquiry on 11th January, 1972. But since it is admitted that the petitioner had not admitted in his *explanation*, any of the charges framed against him, it was incumbent upon the Board of Trustees to hear the oral evidence in support of the charges framed against the petitioner notwithstanding the fact that he had not chosen to appear at theenquiry held on 11th January, 1972 and come to the conclusion that the charges have been proved. he oral evipence not having been heard rule 2 of the aforesaid rules had not been complied with. Moreover, the order dated 11th April, 1972 of the Executive Officer, does not in terms say that the eharges have been proved. Since the alleged resolution dated 11th January, 1972, of the Board of Trustees has not been produced and it has been only contended in the counter of respondents 1 to 3 that it is not necessary

that the order of dismissal should be accompanied by the resolution of Board of Trustees and it is open to the petitioner to obtain a certified copy of the resolution, it has to be held that the respondents have not proved that any resolution was passed by the Board of Trustees on 11th January, 1972 for removing the petitioner from service. Moreover, the order of suspension with effect from 26th April, 1971 itself shows that the Executive Officer had decided on 20th April. 1971 itself that the petitioner should be dismissed, for that order says that he was being suspended from 26th April, 1971 till his dismissal from service by further order. Therefore, I am of the opinion that the principles of natural justice have not been complied with in this case, that no proper enquiry had been held before the petitioner was removed from service, that the order of dismissal passed by the Executive Officer of the Devasthanam is not in compliance with section 56 (1) of the Act and that the petitioner is, therefore, entitled to the relief prayed for in this writ petition. The writ petition is accordingly allowed with costs. Advocate's fee Rs. 150.

R.S. ——— *Writ Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *T. Ramaprasada Rao, CJ.* and *S. Natarajan, J.*

Sankari Cement Alai Thozhilalar Munnertra Sangam, by its Secretary K. Karunakaran .. *Appellant**

v.

The Government of Tamil Nadu by its Secretary, Labour and Employment Department, Fort St. George, Madras-9 and another .. *Respondents.*

Constitution of India (1950), *Article* 226—*Court exercising jurisdiction under the Article—Order by Government in due exercise of their statutory authority— Court not competent to review that order.*

The appellant filed a writ petition seeking for a writ of *certiorari* to quash the order of the first respondent in G. O. Rt. No. 708 Labour and Employment dated 5th April, 1975. Certain disputes arose as between the second respondent management and its workers. A domestic adjustment was made as between the management and the workmen in and by which they agreed that they should enquire into the alleged misconduct of 19 workmen and submit their decision to the Minister for Labour of the State Government for his final decision and action. This was by mutual agreement. Pursuant to this, disciplinary proceedings were initiated by the second respondent against the said workmen and it dismissed the entire lot of them. The Minister for Labour after reviewing the situation was of the view that 14 out of the 19 workmen should be taken back to employment as new entrants and that the decision in the disciplinary proceedings as against the remaining 5 workers should stand. The five workers were not satisfied with the ultimate decision of the Minister for Labour and they raised an industrial dispute. The necessary conciliation proceedings were initiated by the Labour Officer and the report of the Labour Officer was also considered by the Government which was by then asked to refer the non-employment of the five workers to the Industrial Court. The Government, after calling for the conciliation report from the Labour Officer, and in consultation with the Commissioner for Labour, were of the view that there was not sufficient material for them to act under section 10-A of the Industrial Disputes Act. Consequent upon such refusal the present writ petition out of which this appeal arises, was filed to quash the order of the Government under which they refused to act under section 10-A.

Held: It is not for the Court, exercising jurisdiction under Article 226 of the Constitution to remove an order made by the Government in due exercise of their statutory authority, after being satisfied as to the merits of the case. *Certiorari* is a writ issued for the removal of orders made by quasi-judicial Tribunals, who are statutory functionaries exercising quasi-judicial powers. It is only in cases where the Court is satisfied that there is an error apparent or deliberate non-exercise of jurisdiction which the statutory Tribunal has or that while exercising jurisdiction the principles of natural justice have been violated that a writ of *certiorari* is issued to quash such orders made by quasi-judicial Tribunals. There has been in this case, no improper exercise of power or jurisdiction which alone can compel the Court to issue a rule under Article 226 of the Constitution. [*Para.* 2.]

Appeal under Clause 15 of the Letters Patent against the order of Mr. Justice

*W.A. No. 234 of 1979. — *10th July*, 1979.

Mohan, dated 8th February, 1978, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 6816 of 1975 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the first respondent herein in his G. O. Rt. No. 708, Labour and Employment Department, dated 5th March, 1975 to quash the same.

Doraisamy, for Appellant.

The Judgment of the Court was delivered by

Ramaprasada Rao, CJ.—The appellant filed a writ petition seeking for a writ of *certiorari* to quash the order of the first respondent in G. O. Rt. No. 708, Labour and Employment dated 5th April, 1975. The circumstances which led to the filing of the writ petition may be briefly stated. Certain disputes arose as between the second respondent—management and its workers A domestic adjustment was made as between the management and the workmen in and by which they agreed that they should enquire into the alleged misconduct of 19 workmen and submit their decision to the Minister for Labour of the State Government for his final decision and action. This was by mutual agreement entered into between the second respondent the workers before the Minister for Labour on 1st July, 1971. Pursuant to such accord disciplinary proceedings were initiated by the second respondent against the said workmen who dismissed the entire lot of them, but as provided under the agreement referred to above, the subject-matter was referred to the Minister for Labour for his ultimate decision in the matter. It is common ground that the Minister for Labour after reviewing the situation was of the view that 14 out of the 19 workmen should be taken back to employment as new entrants and that the decision in the disciplinary proceedings as against the remaining 5 workers should stand. The five workers were not satisfied with the ultimate decision of the Minister for Labour, though under the accord dated 1st July, 1971, between the management and the workmen concerned they had agreed upon such a course and had left the matter ultimately for the decision of the Minister for Labour, after the conclusion of the disciplinary proceedings by the management. They therefore raised an industrial dispute. The necessary conciliation proceedings were initiated by the Labour Officer, Salem, and the report of the Labour Officer was also considered by the Government which was by then asked to refer the non-employment of the five workers to the Industrial Court. The Government, after calling for the conciliation report from the Labour Officer, Salem, and in consultation with the Commissioner for Labour, were of the view that there was not sufficient material for them to act under section 10-A of the Industrial Disputes Act. The main reason which prompted the Government not to make a reference under section 10-A was that the subject-matter from the inception was governed by the accord dated 1st July, 1971, and that the management having fully submitted themselves to the letter and sprit of that accord, and as the Minister for Labour was of the view that there was justification for the non-employment of the five workers, they would not exercise their jurisdiction under section 10-A and refer the matter to the Industrial Court. Consequent upon such refusal the present writ petition out of which this appeal arises, was filed to quash the order of the Government under which they refused to act under section 10-A.

2. It is not for the Court, exercising jurisdiction under Article 226 of the Constitution to remove an order made by the Government in due exercise of their statutory authority, after being satisfied as to the merits of the case. *Certiorari* is a writ issued for the removal of orders made by quasi-judicial Tribunals who are statutory functionaries or functionaries exercising quasi-judicial powers. It is only in cases where the Court is satisfied that there is an error apparent or deliberate non-exercise of jurisdiction which the statutory Tribunal has or while exercising jurisdiction the principles of natural justice have been violated that a writ of *certiorari* is issued to quash such orders made by quasi-judicial Tribunals Mohan, J., considered the facts and came to the conclusion that on merits the State Government was satisfied that the non-employment of the five workers having been the subject-matter of the earlier accord dated 1st July, 1971, and that having been finalised in terms thereof, there were no further grounds for reconsideation of the matter. Such decisions can be arrived at by the State Government in exercise of their powers under the act. There has been no improper exercise of power or jurisdiction which alone can compel the Court to issue a rule under Article 226 of the Constitution. Rightly therefore Mohan, J. dismissed the writ petition. We see no reason to interfere. The writ appeal is dismissed.

R.S. —— *Writ Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Padmanabhan, J.*

M.S. Babu ... *Petitioner**

v.

The Commissioner, Corporation of Madras and another ... *Respondents.*

Madras City Municipal Corporation Act (IV of 1919), *sections* 85 *to* 97 *and Amending Act,* 1961 (*X of* 1962), *section* 86—*Petitioner, a peon in the Revenue Department of Corporation of Madras—Charges framed against him—Allegation of failing to deposit amount of tax into treasury but mis-appropriating the same—Denial of the charges by petitioner—Oral enquiry by Revenue Officer—Enquiry Officer provisionally concluding that charges against petitioner were proved—Show cause notice issued—Further explanation given—Proceedings before Commissioner, Corporation of Madras—Charges held proved—Dismissal of petitioner from service—No by-laws framed by Corporation—Appeal by petitioner to Special Officer—Confirmation of order of dismissal—Order not served, only communication by Revenue Officer of order of dismissal—Order of Special Officer quashed.*

A writ petition was filed by one '*B*' working as a peon in the Revenue Department of the Corporation of Madras to set aside the order dismissing him from service. It was stated that he was first appointed as a peon and then transferred to the Revenue Department and posted to work under tax collector '*K*'. Charges were framed against him stating that he had not remitted the money collected by him from one '*S*' into the Corporation treasury nor returned the money and thereby had misappropriated the amount. He denied the charges. An oral enquiry was conducted and the Revenue Officer came to the provisional conclusion that the charges were proved and the petitioner should be dismissed from service. The Commissioner, Corporation of Madras by his proceedings finally held that the charges levelled against the petitioner were proved and dismissed the petitioner from service. An appeal filed by the petitioner to the Special Officer was also dismissed. The order was not served but only communicated to him by the Revenue Officer.

Held, that the order of the Special Officer was not served on the petitioner but only a communication from the Revenue Officer was served on him to the effect that the Special Officer had dismissed the appeal. Further on the date on which the Commissioner passed the impugned order he was not competent to do so and the order of dismissal passed against the petitioner was without jurisdiction and void. On the date of the Amending Act of 1961, the bye-laws as provided for under section 86 had not been framed. In these circumstances the order of the Special Officer was also illegal and had to be quashed. [*Paras.* 3 *and* 5.]

Case referred to:—

Arunachalam v *Commissioner, Corporation of Madras,* (1974) 1 M.L.J. 364.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the proceedings of the first respondent in R.D.C. No. M-3/508 3 of 1976 dated 21st October, 1976 as confirmed by the second respondent R.D.C. No. M. 3/50823 of 1976 dated 21st March, 1977 and quash the proceedings therein.

A. Radhakrishnan, for Petitioner.

B. Ram Mohan, for Respondents.

The Court made the following

ORDER.—This writ petition has been filed by one Babu who was working as a peon in the Revenue Department of the Corporation of Madras to set aside the order dismissing him from service. It is stated that he was first appointed as a peon in the Corporation on 21st August, 1964. He was transferred to the Revenue Department on 30th December, 1971. On 7th January, 1972 he was posted to work under the tax collector Kirmani. While so a memo. was issued to him on 6th July, 1976 by the Commissioner. By the said memo. he was placed under suspension. The memo. stated that he had collected a sum of Rs. 100 from Smt. Sakunthala, owner of premises No. 1 A, Dr. Vijayaragavalu Road Madras-81 and that he had not remitted the money into the Corporation treasury nor returned the money and thereby misappropriated the account. Charges were framed against him. He

*W.P. No. 967 of 1977. 3rd July, 1979

submitted his explanation on 26th July, 1976. He denied having received any amount from Sakunthala. He has also stated that in order to evade the property tax the said Sakunthala had given false information to the authorities. An oral enquiry was held by the Revenue Officer on 9th August, 1976. As a result of the oral enquiry the Enquiry Officer came to the provisional conclusion that the charge against the peon had been proved and also to the provisional conclusion that he should be dismissed from the service. He was, therefore, called upon to explain why he should not be dismissed from the service. He offered a further explanation on 22nd September, 1976. On a consideration of his further *explanation* the Commissioner, Corporation of Madras by his proceedings dated 21st October, 1976 finally held that the charge levelled against the petitioner was proved and dismissed him from service with effect from the date of suspension.

2. Thereafter, the petitioner filed an appeal before the Special Officer Standing Committee (T.&F.), Corporation of Madras. He received a communication dated 21st March, 1977 from the Revenue Officer stating that the appeal preferred by him had been dismissed by the Special Officer. The petitioner has filed this petition to quash the order of the Special Officer who confirmed the order of the Commissioner dismissing him from service.

3. About Exhibit A Mr. Radhakrishnan raised two contentions. (1) The Commissioner of the Corporation of Madras had no jurisdiction to dismiss the petitioner from service. According to the learned counsel sections 85 to 97 of the Madras City Corporation Act, 1919 had been repealed and sections 85 to 93 had been substituted by the amending Act of 1961. According to the learned counsel under section 86 the classification, methods of recruitment, conditions of service, pay and allowances and discipline and conduct of the Corporation establishment shall be regulated in the case of the employees included in Class III and Class IV, by by-laws made by the Council under section 349. Such by-laws have not been framed so far by the Corporation. Therefore, the Commissioner of the Corporation had no power to dismiss the petitioner. (2) The learned counsel submitted that the Special Officer has not exercised his mind to the appeal preferred by the petitioner independently of the opinion of the Commissioner who dismissed the petitioner in the first instance. In fact the learned counsel went to the extent of submitting that the Special Officer had not signed the impugned order at all and that the same was prepared by the Commissioner himself. The learned counsel was justified in making this submission because the copy of the order of the Special Officer was not served on the petitioner. Only the communication from the Revenue Officer has been served on him to the effect that the Special Officer has dismissed the appeal. However I called for the original order from the Corporation of Madras where it is found that the Special Officer had passed his order and himself signed the original order.

4. I am satisfied that the petitioner is entitled to succeed on the first of the grounds put forward by him. In *Arunachalam v. Commissioner, Corporation of Madras*,[1] the Headmaster of a Corporation High School who had entered service in 1950 and who was promoted as Headmaster in 1964 was suspended by the Commissioner and an order was passed by way of punishment directing the withholding of his increment for 6 months. K N Mudaliyar, J., allowed the writ petition. It will be sufficient for the present purposes if the headnote is referred to.

"The failure of the Corporation of Madras to frame by-laws would not enable the petitioner to choose to rely on the Transitional Provision No. 5 of Schedule II to the amending Act of 1961 read with section 102 of the same The Transitional Provision No. 5 which talks amount "tenure, remuneration, rights, provileges as to pension and gratuity and other matters" provides for safeguarding the rights and privileges of the employees who have entered the Corporation establishment prior to the coming into force of the amending Act The provision does not clothe the Commissioner with the necessary power of dealing with the discipline and conduct of class III and Class IV employees in the absence of by-laws framed by the Council under section 349 (of the principal Act) within the meaning of section 86 of the amending Act of 1961. If there are no by-laws for the time being in force, particularly at the time of the visitation of punishment on the petitioner, the Commissioner cannot be permitted to fall back on the general power of control. The common law cannot be invoked in the face of statutory provisions for such punishment."

5. This decision of K.N Mudaliyar, J., has been affirmed in writ appeal by a Bench of this Court.

1. (1974) 1 M.L.J. 364.

Admittedly, in this case the petitioner joined duty only after the amending Act of 1916. It is also not disputed that on the date of the amending Act the by-laws as provided under section 86 had not been framed. In these circumstances the situation is governed by the principle stated in the case cited above. I therefore, find that on the date on which the Commissioner passed the impugned order he was not competent to do so and the order of dismissal passed against the petitioner is without jurisdiction and void. In the circumstances the order of the Special Officer is also illegal and has to be quashed.

6. In view of this it is unnecessary to consider the second of the contentions of Mr. Radhakrishnan.

7. Mr. Ram Mohan for the Corporation of Madras cited a decision of Ramanujam, J. In that decision Ramanujam, J., has referred to the judgment of K.N. Mudaliyar, J., and distinguished the same on the ground that while the petitioner before him (Ramanujam, J.) was appointed prior to 1961 amendment the petitioner in the case before K.N. Mudaliyar, J., was appointed subsequent to the amendment Act. As I have already stated, here there is no dispute that the petitioner joined the service of the Corporation only in 1970 subsequent to the amendment Act and therefore the decision of Ramanujam, J. will not apply to the facts of this case.

8. In the circumstances the impugned order of the Special Officer who in turn confirmed the order of dismissal passed by the Commissioner against the petitioner is quashed. The writ petition is allowed. No costs. The petitioner will be reinstated in service.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and S. Natarajan, JJ.*

Haji Abdullah Sait .. *Appellant**

v.

K. Sanjeevi Rao and 8 others .. *Respondents.*

Transfer of Property Act (IV of 1882), sections 106, 111 — Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 30 (iii), 2 (8)—Tamil Nadu Buildings (Lease and Rent Control) Amendment Act (XI of 1964), section 3—Lease—Non-residential Building — Notice issued by landlord terminating the tenancy—Suit filed for recovery of possession — Immediately on expiry of notice tenant becomes trespasser —Rent Control Act does not prohibit filing of suit for recovery of possession—Death of tenant pending suit — L.Rs. brought on record—Legal Representatives also trespassers —Section 3 of Tamil Nadu Act XI of 1964 not applicable to suit of this nature.

'A' the owner of the suit building had leased it to *'S'* in 1940. The lease expired on 15th July, 1943 but *'S'* continued in possession as a tenant holding over because of protection afforded by Rent Control Orders and legislations to such persons from eviction. Under section 30 (*iii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, such protection was not available to the suit building (non-residential) and the amending Act II of 1962 made no change in the position. In that context,

'A' issued a notice, Exhibit P-2, dated 20th January, 1964 to the tenant *'S'*, terminating his tenancy with effect from 29th February, 1964. On expiry of the notice, *'A'* filed a suit in the City Civil Court on 2nd March, 1964 for recovery of vacant possession of the suit property from *'S'* and for damages for use and occupation from the date of the

* O. S. A. Nos. 23 and 75 of 1977. *1st February,* 1979.

plaint. After the written statement had been filed, Tamil Nadu Act XI of 1964 was passed omitting section 30 (*iii*) of the Act of 1960 as amended in 1962, and providing by section 3 that all proceedings pending on the date of the publication of the Act shall abate. Pending the suit, '*S*' died on 15th January, 1968 and certain persons were brought on record as defendants 2 to 10 in their capacity as executors and administrators of the will of '*S*'. The suit which was filed in the City Civil Court, Madras, originally was later transferred to the High Court by consent of parties. The suit was decreed as prayed for on 2nd August, 1976, and it was also held that the late '*S*' was only a trespasser after the notice, Exhibit P-2. '*A*' filed an appeal against the time given for vacating the premises. The third defendant preferred an appeal against the decree for vacant possession.

Held: The fact that the plaintiff in the present case had instituted the suit for recovery of possession from late '*S*' immediately on the expiry of the lease was the clearest possible manifestation of the plaintiff's definite and determined dissent to the late '*S*' continuing in possession of the property. Therefore there was absolutely no scope whatever, on the facts of this case, for holding that from 1st March, 1964, the late '*S*' was a tenant by holding over or a tenant at sufferance. If so, the inevitable position of the late '*S*' was only that of a trespasser. [*Para*. 22.]

Even though entry into possession was lawful, the subsequent possession can become unlawful just as unlawful entry into possession can become subsequently lawful if a person trespasses upon the property but subsequently the owner of the property assents to his continuing in possession on condition of his paying a rent and the subsequent possession becomes lawful. So also, when a person enters into possession of the property as a tenant, but continues to be in possession of the property even after the termination of the tenancy in defiance of the landlord, his possession becomes wrongful. [*Para*. 22.]

The Tamil Nadu Act (XVIII of 1960) itself does not prohibit a landlord from filing a suit for recovery of possession of the property from his tenant and obtaining a decree and it only bars the execution of the decree contrary to the provisions contained therein. Section 3 of the Tamil Nadu Act XI of 1964 did not apply to a suit of this nature, namely, a suit filed by the landlord for recovery of possession of the property from the tenant and obtaining a decree in ejectment therein, whatever may be the position with regard to its execution, which itself will depend upon whether the judgment-debtor enjoyed the protection of the Act or not. [*Para*. 44.]

Since the definition of 'tenant' did not contemplate any person becoming a tenant after the death of the original tenant in respect of a non-residential building, the suit building being, admittedly a non-residential building in which late '*S*' was carrying on a hostel business when he died on 15th January, 1968, there was no other person who could come within the definition of the term tenant under section 2 (8) of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960). Therefore the late '*S*'s statutory tenancy came to an end with his death. Hence defendants 2 to 10, whatever their capacities and whatever their relationship with late '*S*' might be, could not be termed as 'tenants' of the premises in question entitled to the protection of the Act, after the death of '*S*'. [*Para*. 54.]

Defendants 2 to 10 cannot be said to be tenants entitled to the protection of the Act XVIII of 1960 against eviction. [*Para*. 62.]

Cases referred to:—

Anand Nivas Private Ltd. v. *Anandji Kalyanji's Pedhi*, (1964) 4 S.C.R. 892: A.I.R. 1965 S.C. 414; *J. C. Chatterjee* v. *Shri Sri Kishan Tandon*, (1973) 1 S.C.R. 850: A.I.R. 1972 S.C. 2526; *Bengal Judigo Company* v. *Gopee Mohan Majoomdar*, 4 W. R. (Sutherland's) 24; *Jones* v. *Foley*, (1891) 1 Q.B. 730; *Beddall* v. *Maitland*, (1881) 17 Ch.D. 174; *Om Prakash Gupta* v. *The Commissioner of Police, Madras*, (1960) 2 M.L.J. 50: I.L.R. (1960) Mad. 490: 1960 L. W. 788; *Henderson* v. *Squire*, L.R. (1869) 4 Q.B. 170; *Mahant Jagannath Das* v. *Jhanki Singh*, L.R. (1922) 49

I.A. 81; 43 M.L.J. 55: 66 I.C. 337: A.I.R. 1922 P.C. 142; *Harry Kempsoka Gray* v. *Bhagu Mian*, L.R. (1930) 57 I.A. 105: 58 M.L.J. 215: 31 L.W. 425: A.I.R. 1930 P.C. 82; *Shravan Shahasing Patil* v. *Fattu*, (1926) 98 I.C. 911; *Kai Khushroo Bexoniee Capadia* v. *Bai Jerbai Hirjibhoy Warden*, (1949) F.C.R. 262: (1949) F.L.J. 168: A.I.R. 1949 F.C. 124; *Bhawanji Lakamshi* v. *Himatlal Jamnadas Dani*, (1972) 2 S.C.J. 174: (1972) 2 S.C.R. 890: A.I.R. 1972 S.C. 819; *Badrilal* v. *Municipal Corporation of Indore*, (1973) 3 S.C.R. 15: A.I.R. 1973 S.C. 508; *M. C. Chockalingam* v. *Manicka Vasagam*, (1974) 2 S.C.J. 30: (1974) 2 M.L.J. (S.C.) 27: (1974) 2 S.C.R. 143: A.I.R. 1974 S.C. 104; *Lallu Yeshwant Singh* v. *Rao Jagdish Singh*, (1968) 2 S.C.R. 203: (1968) 2 S.C.J. 244: A.I.R. 1968 S.C. 620; *Ramsunder Tewari* v. *Dulhin Bayaso Kuer*, A.I.R. 1935 Pat. 271; *Nagamony Kumaraswamy* v. *S. Thiru Chittambalam*, A.I.R. 1953 Trav.-Co. 369; *Union of India, represented by Secretary, Ministry of Works, Housing, Urban Development, New Delhi* v. *Andhra Bank Limited, Madras*, (1976) 2 M.L.J. 145: 89 L.W. 473: I.L.R. (1976) 2 Mad. 284: A.I.R. 1976 Mad. 387; *R. K. Veerappa Naidu* v. *N. Gopalan*, (1961) 1 M.L.J. 223; *Noolchand Gupta* v. *The Madras Piece Goods Merchants Charitable Trust by its Secretary, V. V. S. Tevanathan*, (1975) 88 L.W. 410; *Theruvath Vittil Muhammadunny* v. *Melapurakkal Unniti*, (1949) 1 M.L.J. 452: I.L.R. (1950) Mad. 152: 63 L.W. 1059: A.I.R. 1949 Mad. 765; *Secretary of State, represented by the Collector of South Arcot* v. *Mash and Co.*, L.R. (1950) 67 I.A. 222: (1940) 2 M.L.J. 140: 52 L.W. 1: I.L.R. (1940) Mad. 599: A.I.R. 1940 P.C. 105; *B. V. Patankar* v. *G. G. Sastry*, (1961) 1 S.C.J. 272: (1961) 1 S.C.R. 591: A.I.R. 1961 S.C. 272; *M/s. Raval and Company* v. *K. G. Ramachandran*, (1966) 2 M.L.J. 68: 79 L.W. 331: I.L.R. (1966) 2 Mad. 437: A.I.R. 1967 Mad. 57; *B. J. Gupta & Company* v. *Venkatesan*, (1975) 1 S.C.C. 46: (1975) 2 S.C.R. 401: A.I.R. 1974 S.C. 2331; *Hajee Abdulla Sait* v. *K. D. Moorjani*, (1975) 88 L.W. 559; *Srimathi Periathayye (alias) P. Muthu Meenakshi Veerakamulu Ammal* v. *L. Narasinga Rao*, (1966) 2 M.L.J. 159; *Damadi Lal* v. *Parash Ram*, (1976) 4 S.C.C. 855: (1976) 2 S.C.W.R. 125: (1976) Lab.L.J. 655: A.I.R. 1976 S.C. 2229: *Md. Sultan Mohideen* v. *Official Trustee, Madras*, (1978) 1 M.L.J. 190: 91 L.W. 170: A.I.R. 1978 Mad. 248; *Moti Ram* v. *Suraj Bhan*, 1960 S. C. J. 699: (1960) 2 S.C.R. 896: A.I.R. 1960 S.C. 655.

Appeals under clause 15 of the Letters Patent and Order 6, R. 1 of O. S. Rules against the decree of Mr. Justice N. S. Ramaswami, dated 2nd August, 1976 and made in the exercise of the ordinary Original /Civil Jurisdiction of the High Court and made in C.S. No. 218 of 1965.

P. Chidambaram and *M. N. Krishnamani*, for Appellant.

A. C. Muthanna, M. Subramaniam, K. C. Ramamoorthy, N. Vibishanan and *N. Rajaram*, for Respondents.

The Judgment of the Court was delivered by

Ismail, J.—These two appeals arise out of the judgment and decree of this Court on the original side, namely, in C.S. No. 218 of 1965. The former appeal has been preferred by the plaintiff, while the latter appeal has been filed by the third defendant in the suit. Since both sides have preferred appeals, for the sake of convenience, we refer to the parties as they have been arrayed in the suit. Admittedly the suit property belongs to the plaintiff. Equally admittedly the property was leased to one late Seetharama Rao under Exhibit P-1 dated 8th July, 1940 and the lease expired on 15th July, 1943, but late Seetharama Rao continued to be in possession as a tenant holding over. This was obviously because the Rent Control Orders and the legislations that were in force in this State gave protection to such persons from eviction. The legislation regarding control of rents started during the second world war. In the then Presidency of Madras the first two orders under the Defence of India Rules were issued as the Madras House Rent Control Order, 1941 and the Madras Godown Rent Control Order, 1942. In 1945 these orders were re-issued

with slight changes, as the Tamil Nadu House Rent Control Order, 1945 and the Tamil Nadu Non-residential Buildings Rent Control Order, 1945. They were replaced by the Tamil Nadu Buildings (Lease and Rent Control) Act, 1946 which in turn was replaced by the Tamil Nadu Buildings (Lease and Rent Control) Act, 1949. That Act also was replaced by the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, Tamil Nadu Act XVIII of 1960, hereinafter referred to as the Act, which came into force on 30th September, 1960, and which is the Act now in force. The Act contained certain exemptions in section 30, according to which the Act did not apply to:—

"(*i*) any building the construction of which was, after the date of the commencement of this Act, completed and notified to the local authority concerned, or

(*ii*) any residential building the rental value of which, on the date of the commencement of this Act, as entered in the property tax assessment book of the municipal council district board, panchayat or panchayat union council or the corporation of Madras as the case may be, exceeds two hundred and fifty rupees per mensem, or

(*iii*) any non-residential building the rental value of which, on the date of the commencement of this Act, as entered in the property tax assessment book of the municipal council, district board, panchayat or panchayat union council or the corporation of Madras, as the case may be, exceeds four hundred rupees per mensem."

Admittedly by virtue of the provision contained in this section in relation to non-residential building, the Act did not apply to the suit building, since the rent for the building in question was Rs. 1,680. Section 30 of the Act was amended by the Tamil Nadu Act II of 1962, with regard to residential buildings. This amending Act replaced the original provision referred to above by the following:

"any residential building or part thereof occupied by any one tenant if the monthly rent paid by him in respect of that building or part exceeds two hundred and fifty rupees".

With regard to non-residential buildings, the provision contained in the original section 30 was replaced by the following provision:

"any non-residential building or part thereof occupied by any one tenant if the monthly rent paid by him in respect of that building or part exceeds four hundred rupees".

Even after the above amendment, the Act was inapplicable to the suit building. It is in this context that the plaintiff issued a notice marked as Exhibit P-2 in these proceedings on 20th January, 1964, terminating the tenancy of late Seetharama Rao with effect from the end of 29th February, 1964. This notice through lawyer informed late Seetharama Rao:

"You are put on notice that as and from the 1st March, 1964 the relationship between my client and you as landlord and tenant shall cease and determine and your occupation in spite of this notice will be at your peril.

Please take notice that if vacant possession is not delivered even after the expiry of the time given in the notice a suit will be filed against you for the recovery of the vacant possession of the said building and you will be held liable for all costs and consequences thereof. My client also puts you on notice that for your occupation which will amount to be in contempt of this notice, he will claim in the suit damages for the use and occupation at the rate of Re. 1 per square foot per month for the floor area of each of the floors in the said building".

2. Late Seetharama Rao not having surrendered possession of the premises on the expiry of the notice, that is, on 1st March, 1964, the plaintiff instituted the present suit on 2nd March, 1964 on the file of the City Civil Court, Madras, for a decree against late Seetharama Rao directing him to quit, vacate and deliver vacant possession of the suit property and to pay damages for use and occupation at the rate of Rs. 6,000 per month from the date of the plaint till recovery of vacant possession. The plaint was a simple one and it stated that late Seetharama Rao was not using the building let to him in a proper manner and had not been maintaining, it in

good condition, that he had also put up ovens without the permission of the plaintiff and that inspite of protests made by the plaintiff, he had not rectified the defects pointed out to him. The plaintiff also stated that he was in *bona fide* need of the premises for his own use as business premises and late Seetharama Rao was also informed about the plaintiff's need, but he had not cared to heed to his request. The plaintiff referred to Exhibit P-2 notice and stated that late Seetharama Rao having failed to deliver vacant possession of the premises the plaintiff was instituting the suit for recovery of possession of the property with damages for use and occupation from the date of plaint at the rate of Rs. 6,000 per month which, according to the plaintiff, would be less than the prevailing rents in the market for similar accommodation.

3. Late Seetharama Rao filed a written Statement dated 25th April, 1964 on 2nd May, 1964. This written statement contained practically no defence to the suit. It was denied in the written statement that there were any defects or that late Seetharama Rao had put up anything without the permission of the plaintiff. He also contended that the plaintiff was merely anxious to extort higher rent and for that purpose had from time to time approached late Seetharama Rao, that although late Seetharama Rao was prepared to pay a reasonable rent, he was not willing to pay anything exhorbitant and that because of that the plaintiff had instituted the present suit on a pretence of requiring it for his own business. His further case was that there was no proper notice of termination of tenancy and the notice dated 20th January, 1964, namely, Exhibit P-2 was merely in keeping with the previous notice to the same effect which were not intended to be acted upon and that the lease of the property must be deemed to be a lease from year to year and accordingly no valid notice as contemplated under the Transfer of Property Act had been issued.

4. After the filing of this written statement, the State Legislature enacted an amending Act, namely, The Tamil Nadu Buildings (Lease and Rent Control) Amendment Act, 1964, (Tamil Nadu Act XI of 1964), which was published in the Fort St. George Gazette Extraordinary dated 10th June, 1964. This Act omitted clause (*iii*) of section 30 of the Act as amended by the Tamil Nadu Act II of 1962, namely, the provision directing non-applicability of the Act to non-residential building or part thereof occupied by any one tenant if the monthly rent paid by him in respect of that building or part exceeded Rs. 400 while section 2 of the Amendment Act XI of 1964 amended section 30 in this behalf as well as in certain other minor respects. It contained a section as section 3 as follows:

"Every proceeding in respect of any non-residential building or part thereof pending before any Court or other authority or officer on the date of the publication of this Act in the Fort St. George Gazette and instituted on the ground that such building or part was exempt from the provisions of the principal Act by virtue of clause (*iii*) of section 30 of the principal Act, shall abate in so far as the proceeding relates to such building or part. All rights and privileges which may have accrued before such date to any landlord in respect of any non-residential building or part thereof by virtue of clause (*iii*) of section 30 of the principal Act, shall cease and determine and shall not be enforceable:

Provided that nothing contained in this section shall be deemed to invalidate any suit or proceeding in which the decree or order passed has been executed or satisfied in full before the date mentioned in this section".

In view of this amendment which came into force on 10th June, 1964, the learned V Assistant Judge, City Civil Court, Madras, on 4th December, 1964 dismissed the suit, as having abated. Against the dismissal of the suit as having abated, the plaintiff preferred an appeal, A.S. No. 266 of 1965 on the file of this Court. At the same time, he also filed two applications before the City Civil Court itself, namely, (1) I.A. No. 2585 of 1965 under Order 9, rule 9, Code of Civil Procedure, to set aside the order dated 4th December, 1964 dismissing the suit as abated; and (2) I.A. No. 2586 of 1965 under section 5 of the Limitation Act to excuse the

delay in filing I.A. No. 2585 of 1965. The City Civil Court, Madras (the learned V Assistant Judge) by an order dated 3rd August, 1965 allowed both the applications and set aside the earlier order dated 4th December, 1964 dismissing the suit as having abated. At that stage on 16th August, 1965 the late Seetharama Rao filed an additional written statement dated 13th August, 1965. In that written statement he contended that subsequent to his original written statement on 2nd May, 1964, section 30 of the Act had been amended and section 3 of the amending Act provided that every proceeding in respect of non-residential building which was exempted under section 30 of the principal Act shall abate, that in view of this provision the present suit (O.S. No. 730 of 1964) on the file of the City Civil Court, Madras and (C.S. No. 218 of 1965 on the file of this Court) shall abate without the written statement being altered and that since the fact of abatement arose after the written statement was filed, he could not put forward that plea in the original written statement and therefore prayed for permission to file the additional written statement.

5. After late Seetharama Rao filed the above additional written statement, the plaintiff filed a reply statement on 16th August, 1965. In that statement while disputing the contention of late Seetharama Rao in the additional written statement, the plaintiff challenged the validity of the amending Act, namely, Tamil Nadu Act XI of 1964 on several grounds, obviously because a writ petition, W.P. No. 1124 of 1963 was pending on the file of this Court challenging its validity.

6. At the same time late Seetharama Rao filed two civil revision petitions against the orders of the City Civil Court, Madras, in the two interlocutory applications referred to above. The said two revision petitions as well as A.S. No. 266 of 1965 came to be disposed of by a Bench of this Court, to which one of us was a party, on 20th June, 1972. The contention urged in the civil revision petitions was that there was no sufficient case for excusing the delay in filing the petition to set aside the order of the City Civil Court dated 4th December, 1964 and that the City Civil Court erred in restoring the suit, as under section 3 of the Amending Act, Tamil Nadu Act XI of 1964, the suit had abated and the City Civil Court had no jurisdiction to pass any orders. One other ground that was urged before the Bench which disposed of the appeal and the civil revision petitions and which had been noticed by the Bench was in relation to the pecuniary jurisdiction of the City Civil Court. It was contended that the City Civil Court had pecuniary jurisdiction upto the value of Rs. 50,000 till 30th April, 1964 and therefore O.S. No. 730 of 1964 which was valued at Rs. 20,304 was properly instituted in the City Civil Court, Madras, but the pecuniary jurisdiction of the City Civil Court was restricted to suits of the value not exceeding Rs. 20,000 and the said restriction became effective from 1st May, 1964 and that therefore the order of the City Civil Court was without jurisdiction.

7. Two events took place before the cases were disposed of by a Bench of this Court. One was that Seetharama Rao died on 15th January, 1968 and certain persons were brought on record as defendants 2 to 10, to which we shall make a detailed reference later. The second was that after the suit was restored to file by the City Civil Court, Madras, on an application under section 24 of the Code of Civil Procedure, by consent of both the parties, the suit was transferred to the original side of the High Court and it was pending as C.S. No. 218 of 1965. It was in that set-up the Bench disposed of A. S. No. 266 of 1965 and C. R. P. Nos. 2152 and 2153 of 1965. The Bench after referring to the relevant facts stated in its order:

> "It is seen from the foregoing dates that at the time of the dismissal of the suit, the lower Court had no jurisdiction to deal, with the suit and in that view, the counsel appearing on both sides represent that the order dismissing the suit as having abated may be set aside and the suit may be tried on the original side of this Court. We accordingly allow the appeal and set aside the order of dismissal of the suit on the ground that the City Civil Court had no jurisdiction to deal with the same on the date of dismissal and direct the suit to be posted on the original side for being dealt with".

8. When the suit was pending on the file of this Court, at the instance of the plaintiff in Application No. 1897 of 1973 by an order dated 29th August, 1973 the plaint was amended and a new paragraph was added as paragraph 9. This paragraph came to be added obviously with reference to the position of defendants 2 to 10 who were brought on record after the death of late Seetharama Rao. In this paragraph the plaintiff stated that the defendants were not tenants within the meaning of section 2 (8) of the Act and hence they were not entitled to claim any protection under the said Act; that assuming that late Seetharama Rao was a statutory tenant, his heirs or legal representatives or the trustees of his business would not be tenants within the meaning of the Act and could not claim any right or interest in the suit property; that the rights of late Seetharama Rao, if any, were not capable of being transferred to or assigned to his heirs or legal representatives or trustees of his business; that the defendants 2 to 10 were mere trespassers with no right or title to remain in the suit property; and that consequently the plaintiff was entitled to a decree for eviction against the said defendants.

9. Before we proceed further, it is necessary to draw attention to one fact. Before his death, late Seetharama Rao had executed a will on 7th January, 1968, a true copy of which has been marked as Exhibit P-3 in these proceedings. Under that will, he constituted defendants 2 to 10 as the executors of his will. In the suit property the late Seetharama Rao was running a hotel in the name of 'Modern Cafe', paragraph 14 of the will dealt with this business, while paragraph 8 of the will dealt with his property known as 'Hotel Dasaprakash' at Poonamallee High Road, Madras-7. According to paragraph 14 he was bequeathing all the movable assets including all the rights, goodwill, etc., in and around and attached to and belonging to him in the business of Modern Cafe, Esplanade, Madras, and its branch activities, with all the assets and liabilities attached thereto in favour of all his sons by his first wife and second wife equally, subject, however, that the Modern Cafe and the branches referred to in that paragraph shall also vest in the trustees appointed by him as mentioned in paragraph 8 of the will who were the same as the executors appointed under paragraph 20 of the will, who shall administer the same including the business thereof likewise until all his liabilities were discharged whereafter they shall vest the property in all his sons.

10. On the death of Seetharama Rao on 15th January, 1968, the plaintiff took steps for impleading his heirs as the legal representatives and he applied to the Court to implead the heirs at law of late Seetharama Rao as defendants 2 to 21. During the pendency of that application, one of the heirs namely, Smt. Ganga Bai died and plaintiff filed another application to implead her heirs also as defendants in the suit. Balakrishna Rao, one of the sons of late Seetharama Rao, who was ultimately impleaded as the third defendant, opposed those applications contending that inasmuch as late Seetharama Rao had left a will appointing executors and administrators and inasmuch as letters of administration had already been obtained, the properly constituted legal representatives were the executors and the administrators and not the heirs of late Seetharama Rao. The Master of this Court, after considering the merits of this contention, directed the impleading of not only the executors and administrators but also all the heirs at law. To set aside that order, an application was filed by way of appeal before this Court on the original side and that came to be disposed of by Palaniswami, J., on 20th July, 1970. In this order, the learned Judge accepted the contention of third defendant Balakrishna Rao and stated:

> "In these circumstances, the orders of the Master directing the impleading of not only the executors and administrators but all the heirs at law is not correct. The estate is satisfactorily and effectively represented by the executors and administrators. They alone are entitled to represent the estate of the deceased, the sole defendant. The order of the Master is, therefore, modified by directing the impleading of the executors and administrators alone as defendants 2 to 10. The plaintiff shall carry out the necessary amendments in the plaint consequent on this order and file into Court a clean amended copy of the plaint

and serve a copy of the same upon the executors and administrators."

It is pursuant to this order that the executors and administrators alone were impleaded as defendants 2 to 10 and it is indisputably clear that they were impleaded only in their capacity as executors and administrators of the will of late Seetharama Rao, accepting their contention. This fact has to be taken into account in appreciating the amendment to the plaint ordered by this Court at the instance of the plaintiff, to which we have just made reference.

11. After the plaint was so amended, two written statements were filed, one by the third defendant and the other by defendants 2 and 4 to 10, who simply adopted the written statement of the third defendant. Both these written statements are dated 23rd December, 1974 and they were filed on the same date. After practically repeating what late Seetharama Rao had stated in his written statement, in paragraph 9 of the written statement now filed by the third defendant, it was stated that the defendants came within the purview of the definition of the word 'tenant' as defined in section 2 (8) of the Rent Control Act and hence they were entitled to claim protection under the said Act. He further stated:

"The defendant states that after the termination of the notice, the said K. Seetharama Rao became the statutory tenant and after his death his legal representatives continued as tenants and are therefore entitled to protection under the Madras Buildings (Lease and Rent Control) Act. This defendant further states that he was assisting his father in the business till his death along with his other brothers and after the death of the first defendant, this defendant along with the other brothers are continuing the business. This defendant states that the 2nd, 4th and 10th defendants were also associated with the deceased Seetharama Rao in his business prior to his death and are continuing the business after his death. The defendants therefore state that they are still the tenants as per the Madras Buildings (Lease and Rent Control) Act even after the amendment of Act XXIII of 1973."

We shall refer to this amendment Act later in the course of this judgment. The plaintiff filed a rejoinder statement on 3rd December, 1975. He demurred to the claim of the third defendant put forward in paragraph 9 of his written statement and contended in paragraph 9 of his rejoinder statement.

"The defendants 2 to 10 are not entitled to the protection under the Rent Control Act. The defendants 2 to 10 are only trustees. The trust, and *a fortiori* the trustees, owe their existence only to the will under which the business was put in a trust. It is strange that the 3rd defendant whose capacity is only that of a trustee, should plead that in that capacity he was assisting his father in the business. None of the defendants 2 to 10 in their capacities as trustees can claim the benefit of tenant under the Rent Control Act."

12. On these pleadings the following issues were framed for trial:

(1) Is the suit maintainable?

(2) Has the plaintiff given proper notice of termination of the suit premises?

(3) Does the suit abate by reason of Act XI of 1964?

(4) Are not the defendants entitled to protection under the Madras Buildings (Lease and Rent Control) Act, 1960, as amended by Act XXIII of 1973?

(5) Whether the tenancy came to an end upon the death of K. Seetharama Rao?

(6) Whether the defendants have no legal interest in the premises and consequently liable to be rejected?

(7) To what reliefs are the parties entitled?

N. S. Ramaswami, J., by judgment and decree, dated 2nd August, 1976 decreed the suit. During the course of the trial, the contention raised in the written statement of late Seetharama Rao that the notice terminating the tenancy, dated 20th January, 1964, Exhibit P-2 was not a proper and valid one was not pursued and it was conceded that under the notice Exhibit P-2, the tenancy by holding over had been validly terminated

with effect from 1st March, 1964. The learned Judge held that the Tamil Nadu Act XI of 1964 did not in any way affect the suit instituted by the plaintiff and in his view, section 3 of the Tamil Nadu Act XI of 1964 did not apply to the suit in question and therefore it did not abate under that section. In the view of the learned Judge, Tamil Nadu Act XI of 1964 did not bring the suit building within the purview of the Act, because according to the definition in that Act, the building must be one let or to be let separately and on the date when the Act came into force, the tenancy in favour of late Seetharama Rao had been validly terminated and therefore the building was not let and it was not also a building to be let and that the status of late Seetharama Rao was only that of a trespasser after the termination of the tenancy with effect from 1st March, 1964. The learned Judge also took the view that defendants 2 to 10, in any event, were not entitled to the protection of the Act because late Seetharama Rao, if he was a statutory tenant, after the Tamil Nadu Act XI of 1964 came into force, had only a personal right and he had no transferable or heritable right which could be claimed by defendants 2 to 10. For this purpose he relied on two decisions of the Supreme Court in *Anand Nivas Private Ltd.* v. *Anandji Kalyanji's Pedhi and others*[1] and *J. C. Chatterjee & others* v. *Shri Sri Krishan Tandon and another*[2]. He further held that the definition of the term 'tenant' in section 2 (8) of the Act will not take in late Seetharama Rao because the inclusive part of the definition relating to the person continuing in possession after the termination of the tenancy will cover only a case of termination of tenancy after the coming into force of the Act and in this case it is only the Tamil Nadu Act XI of 1964, which brought the suit building within the purview of the Act by omitting the exemption under clause (*iii*) of section 30 and the termination of the tenancy having taken place before the amending Act XI of 1964 came into force late Seetharama Rao could not be a tenant as defined in section 2 (8) of the Act. The learned Judge also took the view that even if O.S. No. 730 of 1964 on the file of the City Civil Court had abated under section 30 as amended by the Tamil Nadu Act XI of 1964, defendants 2 to 10 will not be entitled to any protection under the Act. Since if the plaintiff had filed a fresh suit for recovery of possession from them, defendants 2 to 10 could not have any answer to that suit and instead of driving the plaintiff to file a fresh suit the learned Judge could certainly treat the suit in question as a fresh suit and grant a decree for possession against defendants 2 to 10.

13. Repelling the contention of defendants 2 to 10 that after the termination of the tenancy in favour of late Seetharama Rao, he was a tenant holding over or a tenant at sufferance, the learned Judge held that the tenancy in favour of late Seetharama Rao having been validly and properly terminated with effect from 1st March, 1964 and the suit having been instituted on 2nd March, 1964 itself, the plaintiff had not assented to the continuance of possession of late Seetharama Rao in the suit building either expressly or impliedly and therefore late Seetharama Rao did not have the status of a tenant holding over or a tenant at sufferance and he was in the eye of law a trespasser and therefore was liable to be evicted and was liable to pay damages for use and occupation to the plaintiff. The learned Judge also held that defendants 2 to 10 not being tenants as defined in the Act, and therefore not being entitled to the protection of the Act could not claim any right to continue in possession. On these conclusions, the learned Judge found on issue (1) that the suit was maintainable, on issue (2) that the notice to quit validly terminated the tenancy, on issue (3) that the defendants were not entitled to protection uner the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, on issue (4) that the tenancy had come to an end even on 1st March, 1964; and on issue (5) that the defendants had no legal interest in the premises. The learned Judge stated that he was not giving any finding on issue No. 3. In the result he decreed the suit for possession and damages for use and occupation, the quantum of which was to be determined under Order 20, rule 12, Code of Civil Procedure. He also stated

1. (1964) 4 S.C.R. 892 : A.I.R. 1965 S.C. 414.
2. (1973) 1 S.C.R. 850 : A.I.R. 1972 S.C. 2526.

towards the end of the judgment "considering also the circumstances of the case and particularly the fact that a hotel is being run in the premises, I fix the time for giving vacant possession as three years from this date".

14. Inasmuch as the learned Judge gave three years time to defendants 2 to 10 for vacating the premises in question, the plaintiff has filed O.S.A. No. 23 of 1977 contending that the learned Judge erred in giving such a long time for vacating the premises. Against the decree for recovery of possession and mesne profits passed by the learned Judge, the third defendant has preferred O.S.A. No. 75 of 1977.

15. O.S.A. No. 23 of 1977 lies within a very narrow compass and we shall refer to it towards the end of the judgment.

16. O.S.A. No. 75 of 1977 alone is the main appeal in which elaborate arguments were advanced and we shall deal with the same first. Mr. Govind Swaminathan appearing for the third defendant, who is the appellant, contended, that after the termination of the tenancy with effect from 1st March, 1964, the status of late Seetharama Rao was not that of a trespasser and he was a tenant holding over or a tenant at sufferance and that no person who had entered into possession lawfully could subsequently become a trespasser. The learned counsel also contended that the suit instituted by the plaintiff abated as a result of section 3 of the Tamil Nadu Act XI of 1964, and that abatement took place even during the lifetime of late Seetharama Rao. According to the learned counsel, defendants 2 to 10 were tenants under the Act at any rate after the amendment of the Act by the Tamil Nadu Act XXIII of 1973 and as this Court had to apply the law as it was on the date when it disposed of the case, the learned Judge should have, on the definition of the term 'tenant' occurring in section 2 (8) of the Act as amended by the Tamil Nadu Act XXIII of 1973, held that defendants 2 to 10 were tenants entitled to the protection of the Act. The further contention of the learned counsel was that the conclusion of the learned Judge that late Seetharama Rao had no interest in the suit property to transmit to his heirs or to bequeath under his will is not correct and that that is the view taken by the Supreme Court and in fact this agrument really flows from the contention that late Seetharama Rao was not a trespasser, but only a tenant. As a matter of fact, the learned Judge himself points out in his judgment:

"The main controversy now is whether the suit which was originally instituted in the City Civil Court had abated by virtue of section 3 of the amending Act and if not whether the legal representatives of deceased Seetharama Rao are statutory tenants entitled to protection under the Act.

The contention of Mr. K. K. Venugopal, learned counsel for the plaintiff, has been that on the termination of the tenancy, Seetharama Rao became a trespasser, in the eye of law, and that therefore there is no question of the suit having abated by virtue of section 3 of the amending Act as that provision does not apply to a suit to eject a trespasser. It is also his contention that Seetharama Rao was not a statutory tenant when he died and that in any event the legal representatives, being the executors and administrators appointed by Seetharama Rao under the Will, are not statutory tenants entitled to protection under the Act. On the contrary, the contention of Mr. Govind Swaminathan, learned counsel for the defendants, is that even though the tenancy had been validly terminated by notice to quit, Seetharama Rao was never a trespasser, that subsequent to the said notice, the plaintiff had been accepting rents from Seetharama Rao, that therefore tenancy by holding over had been created and that when the amending Act came into force Seetharama Rao became a statutory tenant and after his death, the present defendants became statutory tenants. It is further contended that section 3 of the amending Act did apply to the suit which was then pending in the City Civil Court and that therefore it must be held that it has abated.

Arguments of the learned counsel for the third defendant as well as those of the

plaintiff's learned counsel before us were on the same lines."

Under these circumstances, the points that arise for determination in O.S.A. No. 75 of 1977 are:

(1) What was the status of late Seetharama Rao after the termination of the tenancy—whether he was a trespasser or a tenant holding over or a tenant at sufferance?

(2) Did the suit building come within the purview of the Act and did late Seetharama Rao become a tenant as defined in the Act, on the coming into force of the Tamil Nadu Act XI of 1964?

(3) Whether the suit instituted by the plaintiff abated in view of section 3 of the Tamil Nadu Act XI of 1964?

(4) Whether the "tenancy" came to an end upon the death of Seetharama Rao?

(5) Whether defendants 2 to 10 are entitled to protection against eviction from the suit property by virtue of the Act as amended by the Tamil Nadu Act XXIII of 1973.

Let us now take the first point, namely, what was the status of late Seetharama Rao, when the tenancy was terminated with effect from 1st March, 1964, and he continued to be in possession of the said building without surrendering possession, as demanded by the plaintiff. The learned trial Judge in his judgment stated that the main question that was argued before him was as to whether late Seetharama Rao became a trespasser on the termination of the tenancy and as a matter of fact, it was held by the learned Judge that late Seetharama Rao became a trespasser. The learned Judge further pointed out:

"It was conceded on behalf of the defendants, at one stage, that if Seetharama Rao was a trespasser and no tenancy by holding over had come into existence prior to coming into force of the amending Act, the question of abatement of the suit would not arise and the plaintiff would be entitled to a decree for possession. However, at the last stage of the arguments, it was sought to be contended that as the definition of the word 'tenant' in section 2 (8) of the Act includes a person continuing in possession after the termination of the tenancy 'Seetharama Rao became a tenant' under the Act after the amending Act came into force".

Even before us the argument of the learned counsel for the third defendant was that after the termination of the tenancy late Seetharama Rao did not become a trespasser, when he continued to remain in possession of the suit property and he became a tenant by sufferance, if not a tenant by holding over. We are of the opinion that this contention is unsound and the legal position is clear that when late Seetharama Rao continued to remain in possession of the suit property after the termination of the tenancy his possession was only that of a trespasser.

17. The question came to be considered as early as 1865 in *G. P. Mackintosh on behalf of Bengal Indigo Company v. Gopee Mohun Majoomdar*[1]. In that case the appellant took a farming lease of the respondent's zamindary, the terms of which expired. The appellant-company was duly warned by the landlord that the lease would not be renewed, but notwithstanding that notice, the appellant-company sowed indigo and retained possession of the estate till the crop was ripe. The company kept the landlord out till the next year when he was put into possession by the Collector. The respondent instituted the suit claiming the value of the rice crop which would have been raised had he been allowed to re-enter on his property. The appellant contended that the utmost it could be made liable for was the rent for the months during which it held over. The Court of first instance held that the defendant was liable as if the land had been sown with rice and gave a decree accordingly. The Judge on appeal agreed with the principal Sudder Ameen as to the defendant's liability, but, with regard to the extent of damages, he interfered. On appeal to the High Court, it was contended by the appellant that it had a right to cut and use the crop of indigo and that therefore it can only be held liable for the rent during the time it held over. This claim was rejected by the High Court. The High Court pointed out:

"In support of the first objection it is contended that the zamindar, in giving a lease to the special appellants, did so, know-

1. 4 W.A. (Sutherland's) 24.

ing that they only took it for the purpose of growing indigo on the lands, and that as that kind of crop would not be ripe before August or September, there was an implied permission on the part of the landlord to allow the tenant to hold over till then. To this it may be fairly answered that no implication of consent can or ought to be received where there has been every opportunity of obtaining a consent in express terms; and in this particular case, it is in evidence that the landlord specially warned the company that their lease would not be renewed, and that he should re-enter on the land when the term expired. With this warning staring them in the face, the special appellants persisted in sowing indigo, knowing full well that, long before it could ripen, their occupation of the land would have ceased, and yet not making any arrangements with the landlord, or getting his permission to hold over till the indigo could be gathered. We think that, to justify such a holding over, a direct consent on the part of the landlord was required, and nothing would have been easier than for the special appellant, when the lease was taken, to have stipulated for permission to cut the crop of 1269. This ruling is, we observe, in accordance with English Law, which lays it down that, where the term of a tenant for years depends on a certainty as if he holds from certain midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlords shall have it, in the absence of any special contract or custom to the contrary, for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he could never reap the profits of (Stephen's Comm., page 294, Volume I). In such a case, if the tenant held over in defiance of the landlord, as in the present instance, he would be compelled to pay, not rent for the extra time, but damages. Then, as to the standard of damages, if the special appellants had no right to hold over, their use and occupation of the land was a trespass and they are liable not for rent as tenants, but for damages as trespassers."

The decision in *Jones* v. *Foley*[1], is a striking illustration of this principle. In that case Day, J., Stated:

"It appears that the plaintiff, who was tenant to the defendant, Lady Emily Foley, upon the expiration of his term refused to give up possession of the premises. By such refusal, the defendant, who was desirous of pulling the cottage down and rebuilding another house on its site, was necessarily much embarrassed. She accordingly applied to the justices for a warrant directing the constables, to give her possession. The justices issued their warrant, though its execution was in accordance with the terms of the statute necessarily, suspended for twenty-one days. But the issue of that warrant did not in any way affect the rights of the parties; it neither extended the rights of the tenant, nor limited those of the lessor. Its only effect was to entitle the defendant after the expiry of the twenty-one days to forcibly enter upon the premises, which, apart from the warrant, she could not lawfully do. The defendant, however, did not wait to avail herself of the warrant; but, on the same day that it was issued, she sent the builder to commence the work of pulling the house down. In the course of the removal of the roof, portions of the roof unavoidably fell into the bed room below and damaged some of the furniture. But that did not give the plaintiff any cause of action. The defendant was perfectly justified in doing what she did. The plaintiff had no right whatever to be in the house; he was trespasser. Any injury that happened to his furniture was not due to any unlawful act of the defendant, but was the result of his own obstinacy in unlawfully insisting upon remaining where he was, and he must put up with the consequences. The defendant did not purposely damage the goods. The removal of the roof was effected not with the object of injuring the plaintiff, but simply as a step in the demolition of the defendant's own house. It was contended, indeed, on behalf of the plaintiff, that the act of the defendant here amounted to a forcible entry, and the case of *Beddal* v.

1. (1891) 1 Q.B. 730.

Maitland[1], was relied on as an authority for the proposition that where the party who is entitled to possession enters forcibly, and in the course of the entry does damage to the property of the party who was in possession, an action will lie. The correctness of that proposition it is unnecessary here to consider, for I am clearly of opinion that what was done here did not amount to a forcible entry. It does not belong to the class of acts at which the statutes of forcible entry are aimed."

The above English decision was referred to with approval by a Bench of this Court in *Om Prakash Gupta* v. *The Commissioner of Police, Madras and others*[2]. In that case a question arose with reference in rule 13 of the Madras Cinemas Regulation Rules, 1957. That Rule stated:

"If the applicant for the licence is the owner of the site, building and equipment, he shall produce to the licensing authority the necessary records relating to his ownership and possession thereof. If he is not the owner, he shall, to the satisfaction of the licensing authority, produce documentary evidence to show that he is in lawful possession of the site, building and equipment."

The question that came to be considered by the Bench of this Court was, whether the possession of a tenant, after the termination of the tenancy, can be said to be lawful possession or not. The case decided by the Bench was an appeal from the judgment of Rajagopala Ayyangar, J., who held that on the termination of the lease the appellant could not be said to be in lawful possession of the premises and that decision was confirmed in appeal. While doing so, the Bench observed:

"The learned Advocate-General, who appeared for the owner of the theatre cited to us a number of decisions of English and Indian Courts in support of his contention that a tenant, on the termination of the lease in his favour, is not entitled to continue in possession and is liable to be evicted by the lessor and that he is also liable for mesne profits. *Henderson* v. *Squire*[1], a tenant remaining in possession after the end of the term is described as one in wrongful possession. In *Jones* v. *Foley*[2], a tenant on the expiration of his tenancy, was held to have no right whatever to be on the premises—'He was a trespasser'. The Privy Council ruled in *Mahant Jagarnath Das* v. *Jhanki Singh*[3], that a lessee of zerait land is a tenant within the meaning of section 3 (3) of the Bengal Tenancy Act, 1885, only during the continuance of the term of the lease, and that, upon the expiry of the term, he became a trespasser, liable to be ejected. Such a person would be liable for mesne profits (vide *Harry Kempson Gray* v. *Bhagu Mian*[4]). Indeed, the possession of a tenant, on the expiration of the term of the lease, becomes, wrongful and, therefore, adverse to the landlord within the meaning of Article 144 of Schedule I of the Limitation Act (vide *Shravan Shahasing Patil* v. *Fattu*[5]). Learned counsel for the lessee-appellants, of course, did not challenge the correctness of any of these decisions. Their attempt was to distinguish them all on the ground that what was laid down in those cases was that the possession of a tenant after the expiry of the term of the lease was 'wrongful'.

It is quite true that such a person is liable to be ejected by due process of law. He is also liable for mesne profits. But it cannot be said that his possession was unlawful. So the argument ran."

18. It was that argument which was rejected by the Bench in *Kai Khushroo Bexonjee Capadia* v. *Bai Jerbai Hirjibhoy Warden and another*[6], it was observed by the Federal Court.

1. 17 Ch.D. 174.
2. (1960) 2 M.L.J. 50 : I.L.R. (1960) Mad. 490 : (1960) L.W. 788.

1. L.R. (1869) 4 Q.B. 170.
2. L.R. (1891) 1 Q.B. 730.
3. L.R. (1922) 49 I.A. 81 : 43 M.L.J. 55: 66 I.C. 337 : A.I.R. 1922 P.C. 142.
4. L.R. (1930) 57 I.A. 105: 58 M.L.J. 215: 31 L.W. 425: A.I.R. 1930 P.C. 82.
5. (1926) 98 I.C. 911.
6. (1949) F.C.R. 262 at 270 and 272 : 1949 F.L.J. 168: A.I.R. 1949 F.C. 124 at 127.

"On the determination of a lease, it is the duty of the lessee to deliver up possession of the demised premises to the lessor. If the lessee or a sub-lessee under him continues in possession even after the determination of the lease, the landlord undoubtedly has the right to eject him forthwith; but if he does not, and there is neither assent nor dissent on his part to the continuance of occupation of such person, the latter becomes in the language of English law a tenant on sufferance who has no lawful title to the land but holds it merely through the laches of the landlord. If now the landlord accepts rent from such person or otherwise expresses assent to the continuance of his possession, a new tenancy comes into existence as is contemplated by section 116, Transfer of Property Act, and unless there is an agreement to the contrary, such tenancy would be regarded as one from year to year or from month to month in accordance with the provisions of section 106 of the Act."

It was further pointed out:

"It can scarcely be disputed that the assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it."

Section 116 of the Transfer of Property Act deals with tenancy by holding over and that section states:

"If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106."

Thus, under this section, the vital requirement for a person who continues in possession of the property after the determination of the lease granted in his favour to become a tenant holding over is that the lessor or his legal representative should accept rent from the lessee or under-lessee or otherwise assent to his continuing in possession. Even the requirement as to the acceptance of the rent shall mean acceptance of the amount as rent showing an intention to recognise the tenancy right asserted by the person who pays it as pointed out by the Federal Court in the decision referred to above and the continuance in occupation of the property by the quondam tenant as a tenant.

19. In Mulla's Transfer of Property Act, 1882, VI Edition at page 769, it is stated:

"The act of holding over after the expiration of the term does not necessarily create a tenancy of any kind. If the lessee remaining (a mistake for 'remains') in possession after the determination of the term, the common law rule is that he is a tenant on sufferance. The expression 'holding over' is used in the sense of retaining possession. A distinction should be drawn between a tenant continuing in possession after the determination of the lease, without the consent of the landlord and a tenant doing so with the landlord's consent. The former is called a tenant by sufferance in the language of the English law and the latter class of tenants is called a tenant holding over or a tenant at will. It is submitted, in view of the concluding words of the section, that a lessee holding over with the consent of the lessor is in a better position than a mere tenant at will. The tenancy on sufferance is converted into a tenancy at will by the assent of the landlord but the relationship of landlord and tenant is not established until the rent was paid and accepted. The assent of the landlord to the continuance of the tenancy after the determination of the tenancy would create a new tenancy. The Courts in England have taken a different view and according to that view no fresh tenancy is created

....

....

What the section contemplates is that on one side there should be an offer of taking a renewed or fresh demise evidenced by

the lessee's or sub-lessee's continuing in occupation of the property after his interest has ceased, and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise".

The question came to be considered by the Supreme Court in *Bhawanji Lakamshi and others* v. *Himatlal Jamnadas Dani and others*[1]. In that case, after referring to the decision of the Federal Court referred to above, it was held:

"The act of holding over after the expiration of the term, does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. A distinction should be drawn between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former (*sic* for latter) is a tenant at sufferance in English Law and the latter (*sic* for former) a tenant holding over or a tenant at will. In view of the concluding words of section 116 of the Transfer of Property Act, a lessee holding over is in a better position than a tenant at will. The assent of the landlord to the continuance of possession after the determination of the tenancy will create a new tenancy. What the section contemplated is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise. In *Kai Khushroo Bezonjee Capadia* v. *Bai Jerbai Hirjibhoy Warden*[2], the Federal Court had occasion to consider the question of the nature of the tenancy created under section 116 of the Transfer of Property Act and Mukherjea, J., speaking for the majority said that the tenancy which is created by the holding over of a lessee or under-lessee is a new tenancy in law even though many of the terms of the old lease might be continued in it, by implication, and that to bring a new tenancy into existence, there must be a bilateral act. It was further held that the assent of the landlord which founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it".

20. The question again came to be considered by the Supreme Court in *Badrilal* v. *Municipal Corporation of Indore*[1]. In that case, the Supreme Court followed its earlier decision referred to already and stated:

"But a person who was lawfully in occupation does not become a trespasser, even if he does not become a tenant holding over but is a tenant by sufferance.

* * * * *

The appellant being merely a tenant by sufferance there is no need for any notice before he could be evicted".

21. The connotation of the expression 'lawful possession' occurring in rule 13 of the Madras Cinemas (Regulation) Rules, 1957, came up for consideration before the Supreme Court in *M. C. Chockalingam and others* v. *Manicka Vasagam and others*[2]. The Supreme Court elaborately considered this question and stated:

"Mr. Gupte strenuously submits that 'lawful possession' cannot be divorced from an affirmative, positive legal right to possess the property and since the lease had expired by efflux of time the tenant in this case had no legal right to continue in possession.

In the context of rule 13, we are clearly of opinion that a tenant on the expiry of the lease cannot be said to continue in 'lawful possession' of the property against the wishes of the landlord if such a

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1. (1972) 2 S.C.J. 174 : (1972) 2 S.C.R. 890 : A.I.R. 1972 S.C. 819.
2. (1949) F.C.R. 262 : A.I.R. 1949 F.C. 124.

1. (1973) 3 S.C.R. 15 : A.I.R. 1973 S.C. 508.
2. (1974) 2 S.C.J. 30 : (1974) 2 M.L.J. (S.C.) 27: (1974) 2 S.C.R. 143 : A.I.R. 1974 S.C. 104.

possession is not otherwise statutorily protected under the law against even lawful eviction through Court process, such as under the Rent Control Act. Section 6 of the Specific Relief Act does not offer such protection, but only, as stated earlier, forbids forcible dispossession, even with the best of title.

Turning to rule 13, even in the first part if the applicant for the licence is the owner of the property he has to produce before the licensing authority the necessary records not only relating to his ownership but also regarding his possession. It is implicit, that the owner having a title to the property if he can satisfy the licensing authority with regard to his possession also, will indeed be in 'lawful possession' although the word "lawful' is not used in the first part. It is in that context that the word 'possession' is even not necessary to be qualified by 'lawful' in the first part of rule 13. If, however, the applicant for the licence is not the owner, there is no question of his showing title to the property and the only requirement of the law is to produce to the satisfaction of the authority documentary evidence with regard to his lawful possession of the property. The word 'lawful' therefore, naturally assumes significance in the second part while it was not even necessary in the first part. The fact that after expiry of the lease the tenant will be able to continue in possession of the property by resisting a suit for eviction, does not establish a case in law to answer the requirement of lawful possession of the property within the meaning of rule 13. Lawful possession cannot be established without the concomitant existence of a lawful relationship between the landlord and the tenant. This relationship cannot be established against the consent of the landlord unless, however, in view of a special law, his consent becomes irrelevant. Lawful possession is not litigous possession and must have some foundation in a legal right to possess the property which cannot be equated with a temporary right to enforce recovery of the property, in case person is wrongfully or forcibly dispossessed from it. This Cout in *Lallu Yeshwant Singh* v. *Rao Jagdish Singh*[1], had not to consider whether juridical possession in that case was also lawful possession. We are clearly of opinion that juridical possession is possession protected by law against wrongful dispossession but cannot *per se* always be equated with lawful possession.

Law in general prescribes and insists upon a specified conduct in human relationship or even otherwise, within the limits of the law, Courts strive to take note of the moral fabric of the law. In the instant case, under the terms of the lease, the property had to be handed over to the lessor. Besides under section 108 (*q*) of the Transfer of Property Act, on the determination of the lease, the lessee is bound to put the lessor into possession of the property. Since the landlord has not assented to the lessee's continuance in possession of the property, the lessee will be liable to mesne profits which can again be recovered only in terms of his wrongful possession".

The law is stated as follows in Halsbury's Laws of England, Vol. 38, Third Edition at page 741 in paragraph 1207:

"If a tenancy determines by effluxion of time or otherwise, and the former tenant remains in possession against the will of the rightful owner, the former tenant is, apart from statutory protection, a trespasser from the date of the determination of the tenancy".

The Patna High Court in *Ramsunder Tewari and another* v. *Dulhin Bayaso Kuer*[2], stated:

"If a tenant holds over after the expiry of his lease he ordinarily becomes a trespasser, unless the landlord in some manner signifies his intention of recognising the continuance of the tenancy, which in the present instance is sufficiently indicated by the fact that the suit for rent has been instituted. If the plaintiff had sued the defendant for damages on account of his wrong occupation of his land, it would have

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1. (1968) 2 S.C.R. 203 : (1968) 2 S.C.J. 244 : (1968) 2 S.C.R. 203 : A.I.R. 1968 S.C. 620.
2. A.I.R. 1935 Pat. 271.

been necessary, if the defendant wished to deny that he was a trespasser, that he should indicate that the landlord had in some way or other signified his intention of the continuance of the tenancy; but that question does not arise when by the very form of his plaint the landlord recognizes the tenancy".

In *Nagamony Kumaraswamy and other* v. *S. Thiru Chhittambalam*[1], a Bench of the Travancore-Cochin High Court held:

"thus at least on 21-5-1120 (M.E.), the tenancy in favour of the defendant came to an end and thereafter his possession of the property has to be treated as wrongful possession and as such he is liable to the plaintiffs for the mesne profits obtainable from the property".

As far as the facts of the present case are concerned, there is absolutely no scope for contending that late Seetharama Rao became a tenant by holding over or tenant at sufferance with effect from 1st March, 1964. The judgment of the learned Judge shows that some arguments were advanced before him that the plaintiff received rent from late Seetharama Rao subsequent to 1st March, 1964 and that therefore the plaintiff assented to late Seetharama Rao continuing in possession and recognised him as a tenant. The learned Judge repelled this contention by pointing out that the evidence made it clear that the plaintiff received the rent only without prejudice to his right and with clear understanding that the receipt of the amount would not operate as a waiver of the notice terminating tenancy and even the letter written by the counsel for late Seetharama Rao addressed to the plaintiff, namely, the letter dated 24th July, 1965 enclosing a cheque for Rs. 20,089.29 which was said to be arrears after deducting the corporation tax etc., paid by late Seetharama Rao made it clear that the receipt of the said amount by the plaintiff would not be treated as a waiver of the notice of termination of tenancy and the same was without prejudice to the claims of the plaintiff. However, before us Mr. Govind Swaminathan, learned counsel for the third defendant did not repeat any such contention.

22. As we have pointed out already, the notice Exhibit P-2 terminating the tenancy by 29th February, 1964 is dated 20th January, 1964 and 1st March, 1964 being a Sunday, the suit for recovery of possession of the suit property was instituted on 2nd March, 1964. Thus it will be seen that there was no interval whatever between the date on which the suit was instituted, thereby excluding any scope for putting forward the contention that the plaintiff assented to the continuance of possession of late Seetharama Rao either as a tenant or otherwise. As we have pointed out already, the law is that after the termination of the tenancy, if a teanant continues in possession of the property with the consent of the landlord, he becomes a tenant by holding over and if he continues to be in possession of the property without the consent of the landlord, he becomes a tenant at sufferance. However the position is not the same if the quondam tenant continues in possession of the property notwithstanding the express dissent of the landlord or to use the language of the Court in *G. P. Mackintosh* v. *Gopee Mohun Mojoomdar*[1], already referred to in defiance of the landlord. As the Supreme Court pointed out in *M. C. Chockalingam and others* v. *V. Manickavasagam and others*[2], already referred to, if a landlord has not assented to the lessee's continuance in possession of the property, the lessee would be liable to mesne profits which could again be recovered only in terms of his wrongful possession. The fact that the plaintiff in the present case had instituted the suit for recovery of possession from late Seetharama Rao immediately on the expiry of the lease is the clearest possible manifestation of the plaintiff's definite and determined dissent to the late Seetharama Rao continuing in possession of the property. Therefore there is absolutely no scope whatever, on the facts of this case, for holding that from 1st March, 1964, late Seetharama

1. A.I.R. 1953 Tra. Co. 369.

1. 4 W.A. (Sutherland) 24.
2. A.I.R. 1974 S.C. 104.

Rao was a tenant by holding over or a tenant at sufferance. If so, the inevitable position of late Seetharama Rao was only that of a trespasser. Realising this position only Mr. Govind Swaminathan, learned counsel for the third defendant, contended that once the entry into possession was lawful, in no case the subsequent possession can become unlawful and the person in possession a trespasser. According to the learned counsel, in this case late Seetharama Rao entered into possession of the property as a tenant and continued to remain in possession of the property after the termination of the tenancy and therefore whatever else he might have been, he could not be a trespasser because in the origin his possession was lawful and in support of this contention the learned counsel relied on the decision of the Supreme Court in *Badrilal* v. *Municipal Corporation of Indore*[1], to which we have already made reference and a decision of a Bench of this Court in the *Union of India represented by Secretary, Ministry of Works, Housing, Urban, Development, New Delhi and another* v. *Andhra Bank Limited, Madras*[2]. We are of the opinion that neither of these decisions lends support to such a contention. It cannot be contended, as a general principle of law that if the entry into possession was lawful, such possession cannot become subsequently unlawful. In our opinion even though entry into possession was lawful, the subsequent possession can become unlawful, just as unlawful entry into possession can become subsequently lawful if a person trespassers upon the property, but subsequently the owner of the property assents to his continuing in possession on condition of his paying a rent, the subsequent possession becomes lawful. So also, when a person enters into possession of the property as a tenant, but continues to be in possession of the property even after the termination of the tenancy in defiance of the landlord, his possession becomes wrongful.

23. The observation relied on by the learned counsel for the defendants in the decision of the Supreme Court referred to above, namely, *Badrilal* v. *Municipal Corporation of Indore*[1], is the one we have extracted already namely:

> "But a person, who was lawfully in occupation does not become a trespasser, even if he does not become a tenant holding over but is a tenant by sufferance".

For this observation to apply the condition precedent is that the person must be lawfully in occupation. When a tenancy is determined and the tenant is called upon to hand over possession and the tenant who is, under an obligation continues to be in possession of the property, he cannot be said to be in lawful occupation. In the case which the Supreme Court was dealing with, the appellant became a lessee of a land belonging to the Indore Municipal Corporation for a period of ten years, in 1919. The lease was renewed from time to time and the last of such renewals was in the year 1939 for a period of ten years. The lease expired on 30th September, 1949. On 24th May, 1949 the Municipal Corporation of Indore issued a notice to the appellant directing him to vacate the land on 30th September, 1949. Thereupon he applied to the Municipal Commissioner either to grant him a lease for 99 years and if it was not possible, to renew it at least for a period of 10 years. On 19th December, 1949 the Municipal Council passed a resolution to the effect that the land could be given to the appellant only in case he was ready to deposit Rs. 16,212 of the lease rent and upset price as per schedule rate in accordance with letter No. 3239, dated 26th October, 1949 sent to him by the Municipal Commissioner and that otherwise the said land could be taken back into possession. On 31st December, 1949 the Municipal Commissioner wrote to the appellant in terms of the said resolution of the Municipal Council. The appellant on 9th January, 1950 wrote to the Municipal Commissioner stating that the upset price and rent claimed by the Municipal Council was too much and requesting that the rent and upset price be modified and during the pendency of his petition, the proceedings before the Commissioner be stayed.

1. A.I.R. 1973 S.C. 508.
2. (1976) 2 M.L.J. 145.

1. A.I.R. 1973 S.C. 508.

He then filed a petition for revision before the Minister-in-charge of Municipalities, which was dismissed, on 7th September, 1952. Almost four years later on 14th May, 1956 he wrote to the Commissioner requesting that an amount of Rs. 8,212 might be accepted and he might be permitted to pay the balance in annual instalments of Rs. 1,000 each. On 20th June, 1956 the appellant was informed by the Commissioner that he should deposit the sum of Rs. 8,212 within two days and thereafter the balance would be realised in instalments. The appellant not having paid the amount, the Municipal Commissioner again wrote on 30th July, 1956 giving him two days' time to deposit the amount of Rs. 8,212. On 20th February, 1957, the Commissioner again wrote to the appellant directing him to deposit the whole of Rs. 16,212 within two days telling him that on his failure to do so, steps would be taken for evicting him from the land. On his failure to deposit the said amount, the suit was instituted on 16th September, 1957 for eviction. It is against the background of the facts as stated above, the Supreme Court held that the appellant was a tenant by sufferance and only in that context the above observation was made. Thus, from the above facts it will be seen that the appellant continued to remain in possession of the property after the termination of the lease, not in defiance of the Municipal Corporation, and not in the face of dissent of the Municipal Corporation, but when negotiations were being carried between the parties for the grant of further lease in favour of the appellant. Hence we are of the opinion that the decision of the Supreme Court cannot be an authority for the proposition contended for by the learned counsel for the third defendant.

24. The decision of this Court referred to above dealt with a different set of facts. In that case the tenancy in favour of the Union of India continued till 30th June, 1962 by which time the period of lease expired. The landlord made it known to the tenant that it was not willing to renew the lease and also put on notice the tenant of the fact that it had not expressed its desire in writing for renewal of the lease as contemplated in the original agreement of lease. The monthly rent, which was Rs. 1,150 on 1st July, 1955 was increased to Rs. 1,500 with effect from 1st July, 1959. The Union of India, however, on 24th December, 1962 expressed its desire to continue as a tenant of the premises in question on the same terms and conditions for a further period of three years. On receipt of this communication the landlord determined the tenancy. The landlord wrote a letter to the Union of India on 29th August, 1963 stating that if the Union of India required further lease, it was prepared to renew the lease for a further period of three years from 1st April, 1963, on an enhanced rent of Rs. 2,400 per month, at Rs. 40 per sq. ft. It was also stated that the landlord was not in favour of continuing the lease at Rs. 1,500 per month any further. The landlord also requested the Union of India to treat the matter as specially urgent and communicate its acceptance to it. Subsequently correspondence passed between the parties, the landlord reminding the Union of India that the Union of India had not replied to the demand for enhanced rent made by the landlord and stating that if rents were paid at the old rate of Rs. 1,500 it would be received only as part payment of rent and that the landlord was of the view that the Union of India was agreeable to pay the difference of Rs. 900 in rent from 1st April, 1963 onwards. Finding that no rents were paid from 1st March, 1964 to 30th September, 1964, the landlord demanded such rent at Rs. 2,400 per month and also reminded the tenant that the difference at the rate of Rs. 900 per month towards the rent for the period commencing from April, 1963 to February, 1964 was still outstanding. The landlord accordingly asked for payment of such arrears of rent. The Union of India not having paid the amount, the landlord gave final notice of demand on 11th May, 1966. However, by that time, on 18th April, 1966, the Union of India vacated the premises. In 1967 the suit was filed by the landlord claiming the difference between Rs. 2,400 and Rs. 1,500 per month, as damages for use and occupation of the premises, if not as rent for the period commencing from 1st May, 1963, on the ground that the occupation of the tenant after 30th April, 1963 was unlawful. The only question that came to be considered by this Court in the words of the Judgment itself is:

"The only question argued before us by Mr. Parasaran, the learned counsel, for the appellants, is whether the plaintiffs-respondents are entitled as a matter of course, to rent or damages for use and occupation at the enhanced rate on the only ground that the appellants did not repudiate the claim in the normal way. There is no dispute about the quantum claimed by the plaintiffs on the basis of their stand that the defendants were bound to pay such enhanced rent on the ground that they have impliedly assented to it by not replying to it. The question, therefore is whether the appellants should automatically be made liable to pay rent or damages for use and occupation for the period in question on the only ground that they have not expressly repudiated their liability to pay the enhanced rent."

After considering the several decisions, the Bench of this Court stated the legal position in paragraph 29 of its Judgment as follows:

"Weighing the relative contentions of parties, the following principles emerge:

(1) If a tenant at sufferance continues to occupy the premises after the determination of the lease, then he cannot unjustly enrich himself by claiming that he will pay only the quondam rent and not a reasonable rate of damages for use and occupation of the premises.

(2) If he assents to pay the enhanced rent demanded at a time when the landlord determines the lease, then there is no difficulty at all. He will be considered as a tenant holding over on the basis of a new contract of lease as between himself and the landlord.

(3) If the tenant, in spite of the warning, contumaciously remains in possession of the premises, the landlord secures a right to get a reasonable compensation from the tenant for such occupation but it need not necessarily be the enhanced rate of rent claimed by him; but in no circumstances, it can exceed the enhanced rate demanded by him.

(4) The Court should investigate and it has the jurisdiction to do so, and find in its discretion whether the enhanced rate claimed by the landlord, in such circumstances is penal or otherwise equitably justified.

(5) The Court has the power and indeed the discretion to fix a fair and equitable rent in such situations."

On the basis of the above legal position, the Court remitted the subject-matter to the Court below for ascertaining as to what possibly could be the fair and equitable rent or rate of damages for the period as claimed by the landlord and accepted by the Court and thereafter to grant a decree quantifying such arrears of rent or damages as the case may be.

25. In the course of the judgment, the Bench in paragraph 10 stated as follows:

"In *Badrilal* v. *Indore Municipality*[1], wherein again Alagiriswami, J., speaking for the Bench, expressed the view that a person, who is lawfully in occupation of the premises does not become a trespasser and if he does not become a tenant holding over, he would be a tenant by sufferance. The essential principle, therefore, appears to be that if the landlord consents to such continuance of the tenant in the premises after the determination of the lease, he would be a tenant holding over, but in the absence of any such consent, he would be deemed to be a tenant by sufferance. But in no case he can be characterised as a trespasser. In all such cases, the landlord will be entitled to damages for such use and occupation, the measure of damages being the amount of the profits, which the landlord with due diligence could have received but for the wrongful continuance of the tenant in the property."

The learned counsel Mr. Govind Swaminathan relied upon the above paragraph and in particular the sentence:

"But in no case he can be characterised as a trespasser."

26. What we have observed with regard to the decision of the Supreme Court will apply to this decision also. It is clear in this case also that the Union of India was not in occu-

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1. A.I.R. 1973 S.C. 508.

pation of the premises in question in defiance of the landlord or in the face of the dissent from the landlord, but was in occupation, when the landlord was agreeable to allow the Union of India continuing to be a tenant of the premises on payment of higher rent, without its expressly agreeing to pay a higher rent or refusing to pay such higher rent. Apart from this, the above paragraph cannot be said to be very clear. In fact the sentence in that paragraph, (paragraph 10), namely, "In all such cases, the landlord will be entitled to damages for such use and occupation, the measure of damages being the amount of the profits, which the landlord with due diligence could have received but for the wrongful continuance of the tenant in the property" would appear to be in conflict with the statement contained in the preceding sentences in the same paragraph. Further even in the concluding portion of the judgment, the Bench did not make a distinction between 'rent' and 'damages' and repeatedly used the expression "rent or rate of damages". In view of this, in our opinion, even this Bench decision of this Court does not support the proposition contended for by Mr. Govind Swaminathan.

27. Under these circumstances, we come to the definite conclusion that the status of late Seetharama Rao from 1st March, 1964 was that of a trespasser and he was liable to be ejected and was liable to pay mesne profits or damages for use and occupation to the plaintiff.

28. We shall now take up the second point. The first part of this point is, whether the suit building came within the purview of the Act on the coming into force of the amending Act, namely, Tamil Nadu Act XI of 1964. For the purpose of considering this question, it is necessary and relevant to remember the fact that all the Rent Control Legislations in this State, whether they were in the form of orders issued under other statutes or they were in the form of independent statutes, were temporary legislations. As we have seen already, the first Rent Control Orders were promulgated in 1941 and they were renewed from time to time with regard to residential and non-residential buildings and ultimately the Legislature itself stepped in and enacted Tamil Nadu Act XV of 1946. That Act came into force on 1st October, 1946 and it was intended to remain in force for two years. However, its life was extended from time to time by issuing notifications by the State Government by virtue of the powers conferred upon it by the Act itself. The Tamil Nadu Act XV of 1946 was replaced by the Tamil Nadu Act XXV of 1949, which, as originally enacted, was to remain in force till 30th September, 1951. But by subsequent amendments its life was extended from time to time and ultimately it was replaced by the Act which came into force on 30th September, 1960 and this Act was to remain in force for a period of three years as provided for in section 1 (3) of the Act. However the words 'three years' were substituted by the words 'five years' by the Tamil Nadu Act XVI of 1963 and again the words 'five years' were substituted by the words 'ten years' by the Tamil Nadu Act XX of 1965. Again section 1 (3) of the Act was amended by the Tamil Nadu Act XXVII of 1971 so as to provide that the Act shall remain in force till 30th September, 1972 and again it was extended till 30th June, 1973 by the Tamil Nadu Act XXVII of 1972 and finally by the Tamil Nadu Act XXIII of 1973, sub-section (3) of section 1 of the Act was omitted and therefore the Act became permanent only from the date of the coming into force of the Tamil Nadu Act XXIII of 1973, namely 30th June, 1973.

29. Now we are concerned with the position, as it was before the Tamil Nadu Act XI of 1964. Before the Act can apply to a particular building, the building must satisfy the definition of the term as contained in section 2 (2) of the Act. Section 30 (*iii*) of the Act, as we have already seen, made the Act inapplicable to certain non-residential buildings. Again, as we have seen, the suit building fell within the scope of section 30 (*iii*). If a particular building does not fall within the definition of the term 'building' contained in section 2 (2) of the Act, the said building will be outside the purview of the Act, independent of section 30 (*iii*). On the other hand the aid of section 30 (*iii*) for getting a building outside the scope of the Act is necessary only if the said building falls within the scope of the definition of that term contained in section 2 (2) of the

Act. Even assuming that the suit building came within the definition of the term 'building' contained in section 2 (2) of the Act, still admittedly it was outside the scope of the Act by operation of section 30 (*iii*) and the co-operation was rendered ineffective only by the amending Act, namely, Tamil Nadu Act XI of 1964 which came into force on 10th June, 1964. Consequently the question for consideration is, whether the suit building was a 'building' as defined in section 2 (2) of the Act on 10th June, 1964 so as to attract the applicability of the Act. We have already seen that under the notice Exhibit P-2, the plaintiff terminated the tenancy of late Seetharama Rao by 29th February, 1964 and from 1st March, 1964 the position of late Seetharama Rao was not that of a tenant, but only that of a trespasser and on 2nd March, 1964 the present suit for recovery of possession of the suit property from late Seetharama Rao was instituted. The definition of the word 'building' in section 2 (2) states:

> "building means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes..........."

Consequently it is not every building that comes within the scope of the Act, but only a building let or to be let separately for either of the two purposes. Admittedly on 10th June, 1964, the suit building was not let because the tenancy came to an end by 29th February, 1964 and late Seetharama Rao was not occupying the building from 1st March, 1964 as a tenant, as found by us. Therefore the only other question is, whether the suit building can be said to be a building to be let separately for non-residential purposes on 10th June, 1964. We have already referred to the claim of the plaintiff in his plaint that he needed the building for his own use and the contention of late Seetharama Rao in his written statement, dated 25th April, 1964, that the plaintiff was thereby anxious to extort higher rent and for that purpose had from time to time approached him, that although he was prepared to pay a reasonable rent, he was not willing to pay anything exhorbitant and that it is because of that the plaintiff had instituted the present suit on a pretence of requiring it for his own business. With reference to the notice Exhibit P-2, late Seetharama Rao stated that that notice was merely in keeping with the previous notices to the same effect which were not intended to be acted upon. However before the trial Judge the claim of the plaintiff that he required the premises for his own need was not put in issue and no issue was framed with reference, thereto. The learned Judge himself states in his judgment:

> "On the relevant date, undoubtedly there was no letting of the building and it is nobody's case that the same was to be let."

The correctness of this statement found in the Judgment of the learned Judge, namely, that it was nobody's case that the building was to be let has not been challenged either in the grounds of the appeal filed before this Court or in the arguments before us. Therefore we have to proceed on the basis that it was not the case of the defendants that the plaintiff wanted to let the premises in question. This Court has construed the relevant expression, namely, 'building to be let' occurring in section 2 (2) of the Act as meaning 'building intended to be let' in *R. K. Veerappa Naidu and another* v. *N. Gopalan*[1]. In the present case on 10th June, 1964 it was not the case of the defendants that the building was intended to be let and it was not also their case that at any stage thereafter the plaintiff intended to let the suit building. Therefore it follows that the suit building did not come within the purview of the Act as a result of the amending Act XI of 1964. If the suit premises did not become a building as defined in the Act, *a fortiori* late Seetharama Rao did not become a tenant, as defined in the Act on 10th June, 1964.

30. Independently of the above, the learned Judge has also held that in any event late Seetharama Rao did not become a tenant as defined in the Act. The definition of the term 'tenant' as defined the Act before the coming into force of the Tamil Nadu Act XI of 1964 stood as follows:

> "'Tenant' means any person by whom or on whose account rent is payable for a building and includes the surviving spouse,

1. (1961) 1 M.L.J. 223.

> or any son, or daughter, or the legal representative of a deceased tenant who had been living with the tenant in the building as a member of the tenant's family up to the death of the tenant and a person continuing in possession after the termination of the tenancy in his favour, but does not include a person placed in occupation of a building by its tenant or a person to whom the collection of rents or fees in a public market, cart-stand or slaughter-house or of rents for shops has been farmed out or leased by a municipal council or district board or the Corporation of Madras".

The Tamil Nadu Act XI of 1964, did not touch this definition at all, therefore this definition will apply to late Seetharama Rao, if at all, only if the Act applied to the building. On our conclusion that the Act did not apply to the said building, the question of late Seetharama Rao being a tenant as defined in the Act does not arise. Therefore we are considering this question only alternatively, namely, even assuming that the Act applied to the suit building on 10th June, 1964 by virtue of the coming into force of the Tamil Nadu Act XI of 1964, still whether late Seetharama Rao fell within the definition of the term 'tenant' as defined in the Act. Admittedly the first limb of this definition did not apply to late Seetharama Rao because by 29th February, 1964 the tenancy in his favour had been terminated and, if at all he would fall within the scope of the inclusive portion of the definition alone, namely, 'a person continuing in possession after the termination of the tenancy in his favour'. The learned trial Judge has taken the view that the termination of the tenancy contemplated in this definition must be termination after the coming into force of the Tamil Nadu Act XI of 1964 and it cannot take in a termination of the tenancy that has taken place prior to the coming into force of the said Act because such a construction will give retrospective effect to the definition. The learned trial Judge has also pointed out that analogous Acts of other States use the expression "after the termination of the tenancy, whether before or after the commencement of this Act" and that as the definition of the Tamil Nadu Act has not used that expression, the intention of the Legislature was to take in only termination of tenancy made subsequent to the coming into force of the Act and not termination of the tenancy which had taken place before the coming into force of the Act. In the present case from 30th September, 1960 till 10th June, 1964 on which date the Tamil Nadu Act XI of 1964 came into force, the building in question was outside the purview of the Act and the termination of the tenancy had taken place during this interval and therefore the termination of tenancy in this case not being subsequent to 10th June, 1964, the inclusive portion of the definition of the term 'tenant' in section 2 (8) of the Act will not take in late Seetharama Rao. On this ground late Seetharama Rao will not be a tenant as defined in the Act.

31. For instance, the definition of the term 'tenant' as contained in section 2 (*i*) of the Madhya Pradesh Accommodation Control Act, 1961, reads as follows:

> " 'tenant' means a person by whom or on whose account or behalf the rent of any accommodation is, or, but for a contract express or implied, would be payable for any accommodation and includes any person occupying the accommodation as a sub-tenant and also any person continuing in possession after the termination of his tenancy whether before or after the commencement of this Act, but shall not include any person against whom any order or decree for eviction has been made".

Thus it will be seen that this definition contains the expression 'whether before or after the commencement of this Act' after the expression 'termination of his tenancy' while the Tamil Nadu Act does not contain any such expression. Therefore there is justification for holding that the relevant part of the definition of the term 'tenant' in the Tamil Nadu Act, will apply only to persons continuing in possession after the termination of the tenancy in his favour which termination takes place after the commencement of the Act, and not before the commencement of the Act, because in the absence of anything to the contrary, express or by necessary implication a law is intended to operate only prospectively.

32. In this context Mr. Govind Swaminathan brought to our notice a decision of a Bench of this Court in *Moolchand Gupta and others* v. *The Madras Piece Goods Merchants Charitable Trust by its Secretary, V. V. S. Tevanathan*[1], to which one of us was a party. In our opinion, in that decision this question was not considered. That case also was concerned with a non-residential building which did not fall within the purview of the Act because of section 30 (*iii*) of the Act. The tenancy was terminated on 31st October, 1960 and the suit in ejectment was instituted on 19th February, 1960 which ended in a compromise decree dated 31st January, 1963. The decree provided for a direction for eviction against the quondam tenant, subject to certain terms thereafter mentioned, to wit the landlord being entitled to take possession of that portion of the premises in occupation of one Panchand and the Bullion Market post office immediately by executing the decree in so far as the said portion was concerned and the quondam tenant delivering possession of the rest of the portion in his occupation on or before 31st January, 1964, and the quondam tenant paying mesne profits at Rs. 1,340 per month for the period from 1st November, 1960 to 31st January, 1963 and further mesne profits at Rs. 800 or the other sum per month, failing which the landlord would be entitled to execute the decree immediately. Time for vacating was extended and before the building was actually vacated the Tamil Nadu Act XI of 1964 intervened. The question was, whether by virtue of the intervention of the Tamil Nadu Act XI of 1964, the decree could be executed. The learned trial Judge felt that in view of the fact that there had been a surrender of a part of the holding by the quondam tenant's sub-tenant, there was a disruption of the entire holding and therefore the quondam tenant would not be statutory tenant within the meaning of section 2 (8) of the Act. The Bench disagreed with this conclusion and held that the quondam tenant would be a tenant under section 2 (8) of the Act as he continued to remain in possession of the property even after the termination of the tenancy in his favour. No point was urged before the Court that the termination of tenancy having taken place before Tamil Nadu Act XI of 1964 came into force, the definition of the term 'tenant' in section 2 (8) did not apply to the quondam tenant in that case and therefore the said decision cannot be considered to be an authority for the point which is now raised before us.

33. Thus, late Seetharama Rao would not be entitled to the benefit of the Act by the coming into force of the Tamil Nadu Act XI of 1964 on either of the following two independent grounds:

(1) that the building itself was outside the scope of the Act; and

(2) that even if the building was within the scope of the Act, late Seetharama Rao was not a tenant as defined in the Act.

34. We may mention in this context that before the trial Judge some argument was advanced that the plaintiff himself had recognised late Seetharama Rao as a statutory tenant, after the coming into force of the Tamil Nadu Act XI of 1964, since he had in the written statement filed in C.S. No. 191 of 1974, a suit said to be relating to a neighbouring building, which was one for an injunction against the plaintiff herein, who was the defendant in that suit, stated that late Seetharama Rao was a statutory tenant when he died. However, Mr. G. Ramaswami made it clear before us that he is not advancing any argument based upon it because whether late Seetharama Rao was a tenant under the Act or not is a question which has to be decided with reference to the provisions of the Act and not on the basis of any statement said to have been made by the parties which might have been on an erroneous conception of the legal position.

35. The answer to the third point posed by us depends upon the construction of section 3 of the Tamil Nadu Act XI of 1964, which we have already extracted in full. The construction of Mr. Govind Swaminathan was that the present suit squarely fell within the scope of section 3 and therefore on coming into force of the Tamil Nadu Act XI of 1964 it abated. However, Mr. G. Ramaswami refuted this contention. Though before the learned trial Judge some argument was advanced on behalf of the plaintiff

1. (1975) 88 L.W. 410.

that the defendants themselves proceeded on the basis that the suit did not abate under the Act, since by consent the suit was withdrawn to the High Court for trial and even in A.S. No. 266 of 1965 no contention was put forward that the suit had abated and that therefore there was no question of the order of the city civil Court dismissing the suit as having abated being set aside, and in fact as the order of the Bench of this Court, to which one of us was a party, dated 28th June, 1972 made in A.S. No. 266 of 1965 and C.R.P. Nos. 2152 and 2153 of 1965 referred to already showed, the counsel for the defendants also consented to the order dismissing the suit as having abated being set aside and the suit being tried on the Original Side of this Court and therefore it is not open to the defendants to contend that the suit had abated, before us. Mr. G. Ramaswami made it clear that he is not putting forward any such contention because the question whether the suit had abated or not is a matter to be decided with reference to the language of section 3 of the Tamil Nadu Act XI of 1964 and not on the basis of what the parties thought as to the effect of the said provision. In view of this, we proceed to consider the question with reference to the language of section 3 of the Tamil Nadu Act XI of 1964.

36. The contention of Mr. G. Ramaswami was that the section has no reference to a suit at all and even if it has any reference to a suit, it does not apply to a suit of the present nature and even if it applies to a suit of the present nature, still on the pleadings of the plaintiff the suit will not fall within the scope of section 3 of Tamil Nadu Act XI of 1964. We shall now consider this three-fold submission of the learned counsel.

37. The section itself does not use the word 'suit' and it merely refers to a proceeding before any Court or other authority or officer on the date of the publication of the Tamil Nadu Act XI of 1964 in the Fort St. George Gazette. Therefore the section in terms does not apply to a suit. The only other question is, can it be said that the section by implication refers to a suit, because the word 'Court' is used therein — a mere reference to a proceeding pending in a Court, because in a Court proceeding other than a suit can be pending. Therefore, we have to find out the meaning of the section from the collection of the words occurring in the section, namely, before any Court or other authority or officer. Thus, the section uses three words, 'Court', 'authority' and 'officer' and from the collocation of these words, can any inference be drawn as to what is the nature of the proceeding which the section contemplates? The Act itself contemplates five different forums:

(1) An authorised officer;

(2) the Government;

(3) the Controller, popularly known as Rent Controller;

(4) The appellate authority contemplated by section 23 of the Act; this section contemplates the Government conferring appellate powers on such officers and authorities as they think fit; and

(5) the Court, whether City Civil Court, District Court or High Court.

Consequently when the section rises all the three expressions together, can it not be that the section meant only those functionaries contemplated by the Act? However, if the purpose of the section is taken into account, it is clear that the expression could not have contemplated the functionaries mentioned in the Act, because in such an event, proceedings pending before those functionaries can only be proceedings under the Act. When the very object of the Amending Act is to bring within its scope a building which was then not within the scope of the Act, 'proceeding' referred to in section 3 of the Tamil Nadu Act XI of 1964 can only be a proceeding other than a proceeding under the Act. Therefore, the general word 'proceeding' is capable of including a suit also.

38. However, Mr. Govind Swaminathan wanted to contend that the said section will take in a suit because the proviso to the section referred to a suit. But we are not able to accept this contention, because the proviso, though in form it is a proviso, is not really so, but an independent provision. The normal function of a proviso is to carve something out of the main provision and deal with the same separately as if it constituted an exception to the main provision. In this

case, the main provision of section 3 provides for abatement of pending proceedings, but the proviso deals with a suit or proceeding which has already terminated. As a matter of fact, the language of the proviso, could not apply to a pending proceeding, because it purports to invalidate any suit or proceeding in which a decree or order had already been passed. At the same time if any help is to be derived from the proviso as a proviso for understanding the scope of the main provision in the section, such help can only be in the direction of drawing an inference against the contention of Mr. Govind Swaminathan because the main provision refers only to a proceeding, while the proviso uses the expression 'suit' or 'proceeding' thereby leading to the conclusion that 'proceeding' referred to in the main part of section 3 will exclude a suit.

39. Under these circumstances, we are not able to agree with the contention of Mr. G. Ramaswami that section 3 of Tamil Nadu Act XI of 1964 does not apply to a suit at all, because the main part of section 3 does not use the word 'suit'.

40. However, in our opinion, the second limb of the argument of Mr. G. Ramaswami is well-founded. It is settled law that the Act itself did not prohibit the filing of a suit by a landlord for recovery of possession of the property from the tenant and the plaintiff in that suit obtaining a decree in ejectment, but only in view of the provisions of the Act such a decree cannot be executed. If that was the position of the Act in respect of buildings to which the Act applied from the inception, there was no justification whatever for the Legislature making a contrary provision in respect of non-residential buildings to which the Act is made applicable by virtue of Tamil Nadu Act XI of 1964. A Bench of this Court has elaborately considered this question and settled the legal position by holding that the Rent Control Legislation did not bar a suit for recovery of possession filed by a landlord against a tenant, in *Theruvath Vittil Muhammadunny v. Melepurakkal Unniti and another*[1]. In that decision the Bench consisting of Rajamannar, CJ. and Raghava Rao, J., considered the scope of clause 8 of the Madras Non-Residential Buildings Rent Control Order, 1942. That order read as follows:

"(1) A tenant in possession of a non-residential building shall not be evicted therefrom, whether in execution of a decree, or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this clause;

(2) A landlord wishing to evict a tenant in possession shall apply to the Controller for a direction in that behalf."

We may point out that section 10 of the Act is not very different from clause 8 of the Order, in question. The Bench observed:

"Before dealing with the several decisions on the effect of this clause, let us examine its plain language. Sub-clause (1) lays down that a tenant shall not be evicted from a non-residential building of which he is in possession. 'Evict' literally means 'expel by legal process'. Eviction consists in the physical act of throwing out the tenant from the building which he is occupying. This sub-clause therefore prevents the tenant from being thrown out. One of the methods of such eviction is by the process of execution of a decree for possession. The sub-clause makes it clear that even this method is prohibited. The eviction can only be in accordance with the provisions of clause 8. There is nothing in this clause, or in any of the other clauses of the Order expressly prohibiting the institution of a suit for possession, or prohibiting a civil Court from passing a decree for possession. No doubt, even though a decree for possesion is passed, it may be (sic) not be capable of execution by the civil Court. But the passing of the decree itself is not in terms prohibited.

41. Is there any such prohibition which can be necessarily implied? Is there anything in this clause which takes away, by necessary intendment, the ordinary jurisdiction of a civil Court to entertain a suit by a landlord for recovery of possession of his property in the occupation of a tenant? After referring to the decision of the Judicial Committee

1. (1949) 1 M.L.J. 452.

of the Privy Council in *Secretary of State represented by the Collector of South Arcot* v. *Mask and Co.*[1], and also to certain earlier decisions of this Court on the Rent Control legislation, the Bench stated:

> "There are certain general considerations which, in our opinion, support this view, namely, that the order does not take away the jurisdiction of a civil Court to entertain a suit by a landlord against the tenant and pass a decree therein for possession. Many of these considerations are found set out in an unreported decision of Wadsworth, J., in *Sannidhi Veeraraghavalu* v. *Fathima Bibi Saheba*[2]. These are such considerations:
>
> (1) The cause of action for an application to the Controller would be quite different from the cause of action for a suit in the civil Court; (2) The ground on which the Controller can order an eviction may be quite different from those on the strength of which the civil Court would grant a decree; (3) The failure by the plaintiff to claim a decree for eviction in the civil Court on grounds which would not justify eviction by the Controller might result in grave complications by way of limitation for a suit filed after the Control order ceases to operate; (4) The period during which the execution of a decree is prohibited is limited. The order itself is only for a short duration; and when it is repealed or it expires, a decree of a civil Court can be executed in the ordinary way immediately thereafter.
>
> Having regard to all these considerations and to the language of clause 8 of the Order, I am of opinion that the jurisdiction of a civil Court to entertain and pass a decree in a suit for eviction by a landlord against his tenant is not expressly or impliedly taken away by the provisions of the Rent Control Order."

If we may say so with respect, the above decision of this Court succinctly and clearly lays down that a suit in a civil Court by a landlord for recovery of possession of his property from the tenant is not prohibited by the Rent Control legislation.

42. We may also mention that as pointed out already, till the Tamil Nadu Act XXIII of 1973 came into force, the Rent Control legislation in this State was only a temporary measure and therefore a landlord, taking into account the time that will be consumed in filing a suit and obtaining a decree, can file a suit for eviction and obtain a decree in ejectment with the hope of putting the decree in execution as soon as the temporary measure lapses or is repealed. The question of limitation also may arise. If the temporary measure like the Rent Control Act really intended to prohibit the filing of a suit for the duration of the measure, generally it will make a provision for the exclusion of the period during which the measure was in force for the purpose of calculating the period of limitation for filing a suit. None of the Rent Control measures in this State ever contained such a provision and in such a context, if a suit was to be barred by a temporary Rent Control measure it might happen that on the expiry or the termination of the said measure the suit for eviction might become time-barred. Further the relevant Rent Control Legislations contained a provision empowering the State Government to exempt by notification any building or class of buildings from all or any of the provisions of the Act. In view of this also, there is no need to prevent a landlord from filing a suit for eviction of the tenant and to obtain a decree in ejectment in the hope that the Government may exempt the building from the operation of the Act in which event, he can execute the decree.

The decision of this Court referred to above was rendered on 10th February, 1949. If the Government or the Legislature considered that the above decision did not correctly represent the intention of the Government or the Legislature, necessary amendments would have been made in the Tamil Nadu Buildings (Lease and Rent Control) Act, 1949, which received the assent of the Governor-General on 10th December, 1949, and first published in the Fort St. George Gazette on 14th December, 1949. In that Act also the relevant provision continued to

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1. (1940) 2 M.L.J. 140 : 52 L.W. 1: I.L.R. (1940) Mad. 599: L.R. 67 I.A. 222: A.I.R. 1940 P.C. 105.
2. S.A. No. 80 of 1946.

remain, couched in the same language, namely,

> "A tenant shall not be evicted, whether in execution of a decree or otherwise except in accordance with the provisions of this section". Section 7 (1) of Tamil Nadu Act (XXV of 1949) which language is repeated in section 10 (1) of the Act, which states:

> "A tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or sections 14 to 16".

The above decision of the Bench holds the field till this day and has been followed by several decisions of this Court.

43. The Supreme Court itself in *B. V. Patankar and others* v. *G. G. Sastry*[1], took the same view. In paragraph 9 of its judgment, the Supreme Court observes:

> "The contention of *res judicata* was based on the plea taken by the respondent in his written statement, dated 11th March, 1946, where he pleaded that the civil Court had no jurisdiction to order eviction because of the House Rent Control Order, 1945, to which the reply of the appellants was that considering the nature of the suit and the consequential remedy that they were seeking the plea of jurisdiction of the Court was not open to the respondent. Thereupon the trial Court raised a new issue 'whether this Court has jurisdiction to try the suit, in view of the House Rent Control Order' which was decided against the respondent and a decree in favour of the appellants was passed on 23rd August, 1945. This judgment formed the basis of the argument before us that the plea of inexecutability of the decree could not be raised because it was barred on the principle of *res judicata*. The plea of *res judicata* is not available to the appellants *as the prohibition on account of the House Rent Control Order was not against the passing of the decree but against its execution* and therefore the objection to the executability could only be taken at the time of the execution of the decree which in the instant case could not be done because the order for delivery by the Executing Court was passed without notice to the respondent". (Italics is ours).

1. (1961) 1 S.C.J. 221: (1961) 1 S.C.R. 591: A.I.R. 1961 S.C. 272.

44. Thus, the position is clear that the Act itself does not prohibit a landlord from filing a suit for recovery of possession of the property from his tenant and obtaining a decree and it only bars the execution of the decree contrary to the provisions contained therein. If that be the position under the Act itself, it is hardly reasonable to hold that the amending Act XI of 1964, intended to bring about a different situation with regard to buildings which were till then outside the Act and which were being brought within the purview of the Act by the amending Act. Consequently we hold that section 3 of the Tamil Nadu Act XI of 1964, did not apply to a suit of this nature, namely, a suit filed by the landlord for recovery of possession of the property from the tenant and obtaining a decree in ejectment therein, whatever may be the position with regard to its execution, which itself will depend upon whether the judgment-debtor enjoyed the protection of the Act or not.

45. In our opinion, on another ground also, it must be held that section 3 of the Tamil Nadu Act XI of 1964, did not apply to the suit in question. Section 3 contemplated the following requirements:

(1) There must be a proceeding in respect of a non-residential building or part thereof;

(2) That proceeding must be pending before any Court or other authority or officer on the date of the publication of the said Act (Tamil Nadu Act XI of 1964) in the Fort St. George Gazette; and

(3) That proceeding should have been instituted on the ground that such building or part thereof was exempt from the provisions of the principal Act by virtue of clause (*iii*) of section 30 of the principal Act.

Unless all these three requirements are cumulatively satisfied the section will not be attracted. In the present case the suit in question was in respect of a non-residential building and it was pending before a Court on the date when the Tamil Nadu Act XI of

1964 was published in the Fort St. George Gazette. However the question for consideration is, whether the third condition was satisfied or not, namely, whether the suit was instituted on the ground that the suit building was exempt from the provisions of the principal Act by virtue of clause (*iii*) of section 30 of the principal Act. Admittedly in the present case the plaint does not make any reference whatever to the Act much less a claim that the suit building was exempt under clause (*iii*) of section 30 of the Act. Equally in the written statement of late Seetharama Rao dated 25th April, 1964 there was no reference whatever to the Act. In view of this, it cannot be contended that the suit was one instituted on the ground that the suit building was exempt by virtue of clause (*iii*) of section 30 of the Act. However, Mr. Govind Swaminathan contended that the expression 'On the ground' occurring in the section (section 3 of the Tamil Nadu Act XI of 1964) must be read as 'by reason of'. We are unable to accept this contention for the simple reason that it is not in accordance with the ordinary and natural meaning of the section. Mr. Govind Swaminathan contended that if such a construction is placed namely, that the suit to which the section applies must be a suit instituted on the ground that the building was exempt from the provisions of the Act by virtue of clause (*iii*) of section 30 meaning thereby that the plaint must rely upon that exemption, the drafting of the plaint alone will decide the question whether the suit falls within the scope of the section or not and that could not have been the intention of the Legislature. We are unable to accept this argument either. It is the duty of the Court to give effect to the provision as it stands and therefore it cannot escape from the conclusion that the section applies only to a proceeding instituted on the ground that the building in question was exempt from the provisions of the Act by virtue of clause (*iii*) of section 30 of the Act. From one point of view, such a ground is absolutely necessary. The language of the opening part of the section is very wide. It uses the expression, "Every proceeding in respect of any non-residential building or part thereof". The section does not indicate the nature of the proceeding; nor does it state as to what type of proceedings the said section will apply. The general expression extracted above may take in even suits for declaration of title with regard to non-residential buildings. Having used the widest possible words in the opening part of the section, certainly it was necessary for the Legislature to circumscribe the operation of that wide language and that circumscription has to be found in the ground on which the proceeding is instituted. Therefore the Legislature has provided for the third requirement by way of qualifying the very wide expression constituting the first requirement. In other words, the third requirement enables one to identify the proceeding which is comprehended by the section, as without that requirement, the section will refer to any and every proceeding in respect of any non-residential building.

So far as the section is concerned, the abatement of the proceeding is automatic and it does not require any order on the part of a Court or other authority or officer abating the proceeding. In such a context, there may be a dispute as to whether a particular proceeding falls within the scope of the section or not. If such a controversy arises, the Court or the other authority or officer before whom the proceeding is pending will have to determine whether the suit is one which falls within the scope of the section or not. For the purpose of resolving that controversy certainly the Court or other authority or officer canot go into the merits of the dispute between the parties, but will have to find out whether the nature of the proceeding is such as to fall within the scope of the section or not. Therefore there must be some criterion for deciding whether the proceeding falls within the scope or not, because the section itself does not indicate the nature of the proceeding to which it applies and that criterion is that the proceeding must be instituted on the ground that the non-residential building in question was exempt from the provisions of the Act by virtue of clause (*iii*) of section 30 of the Act. Hence, we are of the opinion, that for a suit to come within the scope of the section, it must be instituted on the ground that the building in question was exempt from the provisions of the Act by virtue of clause (*iii*) of section 30

of the Act and once such a ground is put forward, necessarily such a suit will pray for the relief which it could not have prayed for, if the building was not exempt from the provisions of the Act.

46. This Court as well as the Supreme Court had their own comments to make on the language and structure of the section. In *M/s. Raval and Co.* v. *K. G. Ramachandran and others*[1], a Full Bench of this Court stated with reference to this section as follows:

"It has to be immediately conceded that the wording of this section can by no means by described as happy, or free from any cloud of ambiguity. It is not very clear how a proceeding could have been instituted 'on the ground that such building or part was exempt from the provisions of the principal Act by virtue of clause *(iii)* of section 30', or what is the precise scope of the rights and privileges which may accrue to the landlord, and which are to cease and determine".

The Supreme Court in *P. J. Gupta and Co.* v. *K. Vekatesan*[2], stated:

"It is not necessary for the purposes of the case before us, to speculate about the type of cases which may actually fall within the two wings of the obviously unartistically drafted section 3 of the Amending Act. It is enough for us to conclude, as we are bound to on the language of the provision that the case before us falls outside it."

In the same judgment, the Supreme Court had considered the scope of section 3 of the Tamil Nadu Act XI of 1964 no doubt, from the point of view of a different controversy. In paragraph 7 of the judgment the Supreme Court observed:

"The obvious result of section 30 *(iii)* of the Act, as it stood before the amendment, was that, if the renewal value of a non-residential building, as entered in the property tax book of the Municipality, exceeded Rs. 400 per mensem, a description which applies to the premises under consideration before us, the landlord would have no right to proceed against the tenant for eviction under section 10 (2) *(ii)* (a) of the Act. Section 3 of the Amending Act, on the face of it, applies to two kinds of cases. Its heading is misleading in so far as it suggests that it is meant to apply only to one of these two kinds. It applies: firstly, to cases in which a proceeding has been instituted 'on the ground' that a non-residential building 'was exempt from the provisions of the Act by virtue of clause *(iii)* of section 30 of the Act and the plaint must state so'. Though Mr. Govind Swaminathan at one stage contended that the second limb of the main part of section 3 would also have the effect of nullifying the suit in question, he gave up that contention in question. He gave up that contention in view of the decision of the Supreme Court just referred to above holding that the section applies to two kinds of cases."

47. However, Mr. Govind Swaminathan referred to a decision of this Court in *Srimathi Periathayya* alias *P. Muthu Meenakshi Veerakamulu Ammal and another* v. *L. Narasinga Rao*[1], decided by Veeraswami J., as he then was, in support of his contention that a suit of the present nature abated under section 3 of the Tamil Nadu Act XI of 1964. We are of the opinion that the said decision has not decided any such question. That was a case where the plaintiff had instituted a suit for ejectment of a tenant and after the coming into force of the Tamil Nadu Act XI of 1964, the plaintiff applied to the Court for refund of the court-fee paid on the plaint on the ground that by reason of the amending Act XI of 1964, the suit abated and all the rights which had accrued to the plaintiff prior to the amendment became unenforceable. The trial Court took the view that there was no provision in the Tamil Nadu Court-fees and Suits Valuation Act, 1955, for refund of the court-fee under those circumstances. When the matter was taken up in revision to this Court, the learned

1. (1966) 2 M.L.J. 68 : 79 L.W. 331 : (1966) I.L.R. 2 Mad. 437: A.I.R. 1967 Mad. 57.

2. (1975) 1 S.C.C. 46 : (1975) 2 S.C.R. 401 : A.I.R. 1974 S.C. 2331 at 2333.

1. (1966) 2 M.L.J. 159.

Judge stated that the case in question is a peculiar case, that when the suit was instituted, it was properly instituted and the court-fee on the plaint was also properly paid, that by reason of clause (*iii*) of section 30 of Tamil Nadu Act XVIII of 1960 the suit was competent, but the Tamil Nadu Act XI of 1964 enacted that the suit shall abate and that the result was the suit could no longer be continued for no fault of the plaintiff and that justice demanded in the circumstances that the plaintiff should not be made liable for the entirety of the court-fee. Thus, the question which the learned Judge had to decide was whether the court-fee was refundable on the assumption that the suit abated and the learned Judge had no occasion to consider whether the suit abated at all and the same was not put in controversy. Under these circumstances, that decision is not of any avail to support the contention of Mr. Govind Swaminathan.

48. Hence we are clearly of the opinion that the present suit instituted by the plaintiff did not abate under section 3 of the Tamil Nadu Act XI of 1964. It is convenient to consider the fourth and fifth points together. The question that arises for consideration is whether the tenancy came to an end upon the death of Seetharama Rao or not. Naturally this question will arise only if our conclusion that by virtue of the Tamil Nadu Act XI of 1964 the building in question did not come within the purview of the Act or that late Seetharama Rao did not become a tenant as defined in section 2 (8) of the Act is wrong. Therefore, for the purpose of consideration of this question, we are proceeding on the assumption that the Act applied to the building in question on 10th June, 1964 and late Seetharama Rao became a tenant as defined in section 2 (8) of the Act, by virtue of the operation of the Tamil Nadu Act XI of 1964. N. S. Ramaswami, J., has held that with the death of Seetharama Rao, whatever protection he had against eviction, came to an end. In other words, late Seetharama Rao became what is loosely described as a "statutory tenant" on his death. "Statutory" tenancy came to an end and for this purpose the learned Judge relied on two decisions of the Supreme Court, namely *Anand Nivas Private Ltd.* v. *Anandji Kalyanji's Pedhi and other*[1], and *J. C. Chatterjee and others* v. *Shri Sri Kishan Tandon and another*[2].

49. In *Anand Nivas Private Ltd.* v. *Anandji Kalyanji's Pedhi and others*[1], the Supreme Court was concerned with the provisions contained in the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 as amended by Ordinance III of 1959. The question there was, whether the tenant, whose tenancy had been terminated, had no right to sublet the premises. The majority held that the tenant whose tenancy was determined, but who continued in possession had no power of subletting. According to them:

> "A person remaining in occupation of the premises let to him after the determination of or expiry of the period of tenancy is commonly though in law not accurately, called 'a statutory tenant'. Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute. The right of a lessee from a landlord on the other hand is an estate or interest in the premises and in the absence of a contract to the contrary is transferable and the premises may be sub-let by him. But with the determination of the lease, unless the tenant acquires the right of a tenant holding over, by acceptance of rent or by assent to his continuing in possession by the landlord, the terms and conditions of the lease are extinguished and the rights of such a person remaining in possession are governed by the statute alone. Section 12 (1) of the Act merely recognises his right to remain in possession so long as he pays or is ready and willing to pay the stand-

1. A.I.R. 1965 S.C. 414.
2. A.I.R. 1972 S.C. 2526.

ard rent and permitted increases and performs the other conditions of the tenancy, but not the right to enforce the terms and conditions of the original tenancy after it is determined.

*   *   *   *   *

A statutory tenant has no interest in the premises occupied by him, and he has no estate to assign or transfer......"

In *J. C. Chatterjee and others* v. *Shri Sri Kishan Tandon and another*[1], the question that came to be considered was whether the legal representatives of a statutory tenant who died pending a second appeal could be said to be tenants within the protection of the Rajasthan Premises (Control of Rent and Eviction) Act (XVII of 1950). In that case, the respondent before the Supreme Court had filed the suit for ejectment against one B. N. Chatterji on the ground that the plaintiff required the house *bona fide* for the residence of himself and his family. The defendant contested the suit alleging that the landlord did not require the premises *bona fide*. The learned District Munsif held in favour of the landlord and decreed the suit for ejectment. The tenant filed an appeal in the Court of the District Judge, Ajmer, who held that the landlord did not require the premises reasonably and *bona fide* and allowed the appeal and dismissed the suit. Thereupon the landlord filed a second appeal in the Rajasthan High Court. During the pendency of the second appeal, the tenant died and his widow and children were brought on record as his heirs and legal representatives. Before the High Court it was contended on behalf of the landlord that the deceased, after the determination of the tenancy, was only 'a statutory tenant' under the Rajasthan Act XVII of 1950, and that the protection granted by section 13 of the said Act was not available to the heirs of the tenant and therefore even if it be held that the landlord had failed to prove the reasonable and *bona fide* requirement, the landlord was entitled to a decree, because the legal representatives of the deceased statutory tenant were not entitled to the protection of the said Act. The High Court reversed the order of the District Court and restored the decree passed by the District Munsiff. The Supreme Court upheld the conclusion of the High Court. The Supreme Court observed:

"It is now settled that after the termination of the contractual tenancy the statutory tenant has only a personal right to continue in possession till evicted in accordance with the provisions of the Act".

Thereafter a reference to the decision of the Supreme Court in *Anand Niwas Private Ltd.* v. *Anandji Kalyanji's Pedhi and others*[1], was made and after extracting a passage in that judgment the Supreme Court proceeded to state:

"These observations have been made with reference to the provisions of the Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947. But they equally apply to the provisions of the Act with which we are concerned. The protection given to B. N. Chatterji was personal to him and if that protection is withdrawn either because there is a change in the statute or because the person who is to be personally protected is no longer living, the question arises as to what is the position of the legal representatives of the deceased statutory tenant *qua* the landlord in a proceeding of the nature with which we are concerned.

(10) It is obvious that the appellant landlord's right to proceed with the appeal with a view to obtain possession of his premises did survive under Order 22, rule 4 read with rule, 11, Civil Procedure Code. Where the right to sue and prosecute the appeal survives, the appellant is bound to cause the legal representatives of the deceased respondent to be made a party and proceed with the appeal. Therefore, the heirs and legal representatives of the aforesaid B. N. Chatterji were rightly brought on record and the appeal had to proceed.

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1. A.I.R. 1972 S.C. 2526.

1. A.I.R. 1965 S.C. 414.

(11) Under sub-clause (ii) of rule 4 of Order 22, Civil Procedure Code, any person so made a party as a legal representative of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the Court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title.

(12) The heirs of the tenant purported to contend that after the death of the statutory tenant, they, as next heirs, enjoyed the status of 'tenant'. For this reliance was placed on the definition of the word 'tenant' given in section 3, clause (*vii*) of the Act. According to the definition unless there is anything repugnant in the subject or context 'tenant' means the person by whom rent is, or but for a contract express or implied would be, payable for any premises and includes any person holding or occupying the premises as a sub-tenant or any person continuing in possession after the termination of tenancy in his favour otherwise than under the provisions of the Act. It was contended before us that since the rent was payable by the heirs and in fact it was paid during the pendency of the proceedings, they were tenants within the definition. In our opinion, rent was not payable by the legal representatives and if the rent was paid by them during the course of the proceedings it was not because they were recognised as tenants by the landlord but because the amount was received by him without prejudice to his rights under the orders of the Court. Indeed if the original tenant had died before the contractual tenancy had been terminated then the heirs would have inherited the tenancy and in that sense the rent would have become payable by them. But that is not the position here.

When B. N. Chatterji died, he was only a statutory tenant with a personal right to remain in possession till eviction under the provisions of the Act, and the heirs were incapable of inheriting any estate or interest in the original tenancy".

From these decisions, it is clear that what late Seetharama Rao acquired on 10th June, 1964 and had thereafter was a personal right and personal protection against eviction except according to the povisions of the Act and that personal right came to an end on his death on 15th January, 1968 and the legal representatives brought thereafter could only put forward the claim which late Seetharama Rao had. Having a right to put forward such a claim against eviction only during his lifetime, there was no defence to the suit for ejectment which defendants 2 to 10 could have put forward.

50. However, Mr. Govind Swaminathan contended that the above decisions of the Supreme Court cannot be said to be good law, in view of the subsequent judgment of the Supreme Court in *Damadilal and others* v. *Parashram and others*[1]. In that case, the Supreme Court was concerned with the Madhya Pradesh Accommodation Control Act (XLI of 1961). In that case, after the determination of the tenancy, the landlords had filed a suit for recovery of possession of the property from two tenants. The trial Court dismissed the suit. On appeal by the plaintiffs the first appellate Court reversed the decision of the trial Court and decreed the suit. The defendants preferred a second appeal. The two tenants died one after another and their legal representatives were brought on record. At that stage the plaintiffs made an application praying for an order that the appeal had abated as a consequence of the death of both the defendants. In that application the plaintiffs contended that the two defendants were merely statutory tenants and their right to resist ejectment on the basis of the Madhya Pradesh Accommodation Control Act was merely a personal right which was not heritable and had not devolved

1. (1976) 4 S.C.C. 855 : (1976) 2 S.C.R. 125 (1976) Lab. L.J. 655 : A.I.R. 1976 S.C. 2229.

upon their heirs. The High Court allowed that application and ultimately allowed the appeal and set aside the decree of the lower appellate Court and restored that of the trial Court dismissing the suit. The matter came up on further appeal to the Supreme Court. Before the Supreme Court reliance was placed on the two decisions, namely, *Anand Nivas Private Ltd.* v. *Anandji Kalyanji's Pedhi and others*[1] and *J. C Chatterjee and others* v. *Shri Sri Kishan Tandon and others*[2], and after referring to those decisions and stating that both of them proceeded on the basis that a tenant whose tenancy had been terminated, described as statutory tenant, had no estate or interest in the premises but only a personal right to remain in occupation, the Supreme Court referred to similar legislations in England and how the Courts in England have construed the provisions of such legislation and finally observed:

"We find it difficult to appreciate how in this country we can proceed on the basis that a tenant whose contractual tenancy has determined but who is protected against eviction by the statute, has no right of property but only a personal right to remain in occupation, without ascertaining what his rights are under the statute. The concept of a statutory tenant having no estate or property in the premises which he occupies is derived from the provisions of the English Rent Acts. But it is not clear how it can be assumed that the position is the same in this country without any reference to the provisions of the relevant statute. Tenancy has its origin in contract. There is no dispute that a contractual tenant has an estate or property in the subject-matter of the tenancy, and heritability is an incident of the tenancy. It cannot be assumed, however, that with the determiation of the tenancy the estate must necessarily disappear and the statute can only preserve his status of irremovability and not the estate he had in the premises in his occupation. It is not possible to claim that the 'sanctity' of contract cannot be touched by legislation. It is therefore necessary to examine the provisions of the Madhya Pradesh Accommodation Control Act, 1961, to find out whether the respondents' predecessors-in-interest retained a heritable interest in the disputed premises even after the termination of their tenancy".

51. After extracting the definition of the term, 'tenant' as contained in section 2 (*i*) of the Madhya Pradesh Accommodation Control Act, which we ourselves have done, while dealing with the previous point, the Court proceeded to state:

"The definition makes a person continuing in possession after the determination of his tenancy a tenant unless a decree or order for eviction has been made against him, thus putting him on par with a person whose contractual tenancy still subsists. The incidents of such tenancy and a contractual tenancy must therefore be the same unless any provision of the Act conveyed a contrary intention. That under this Act such a tenant retains an interest in the premises, not merely a personal right of occupation, will also appear from section 14 which contains provisions restricting the tenant's power of subletting".

After extracting section 14 and making certain observations with reference thereto, the Court concluded:

"The concept of statutory tenancy under the English Rent Acts and under the Indian statutes like the one we are concerned with in this appeal rests on different foundations. It must therefore be held that the predecessors-in-interest of the present respondents had a heritable-interest in the premises and consequently the respondents had the right to prosecute the appeal in the High Court".

52. It must be seen that this decision did not overrule the earlier two decisions of the Supreme Court. All that the Court stated was that the question whether a person continuing in possession of the property after the termination of his contractual tenancy has no right to property but only a personal right to remain in occupation should be determined with reference to what his rights are under the particular statute and on the construction of the provisions contained in the

1. A.I.R. 1965 S.C. 414.
2. A.I.R. 1972 S.C. 2526.

Madhya Pradesh Accommodation Control Act, 1961. The Court came to the conclusion that the person continuing in possession after the termination of the tenancy in his favour under that Act did not have merely a personal right but also had a heritable interest in the premises.

53. The above decision was relied on, on behalf of the defendants before the learned trial Judge himself and the learned trial Judge has observed that the said decision did not overrule the earlier two decisions of the Supreme Court and the said decision was arrived at on the construction of the provisions of the particular Act, that the earlier two decisions continued to remain in force and that they constituted clear authority for the proposition that a statutory tenant had no heritable right and his rights were only personal. We are not persuaded to take a view different from the one taken by the learned trial Judge in this behalf.

54. We shall also refer to one further feature which supports the above conclusion of ours. We have already extracted the definition of the term 'tenant' as contained in section 2 (8) of the Act. That definition continued to remain in force till the same was amended by the Tamil Nadu Act XXIII of 1973 which itself came into force on 30th June, 1973. That definition clearly shows that the expression 'tenant' includes only the surviving spouse, or any son, or daughter, or the legal representative of a deceased tenant who had been living with the tenant in the building as a member of the tenant's family up to the death of the tenant. This will clearly indicate that the same was referable only to tenancy in respect of residential building and would have no application to tenancy in respect of non-residential building, since the expression "living with the tenant in the building as a member of the tenant's family" is totally inapposite with reference to the tenancy of a non-residential building. It will also be clear that the definition of 'tenant' under the Act took in only certain enumerated relations or legal representatives who had been living with the tenant in the building as members of the tenant's family. Thus it will be seen that it takes in a surviving spouse or a son or a daughter, whether that spouse or son or daughter is a legal representative or not so long as that spouse or son or daughter had been living with the tenant in the building as a member of the tenant's family up to his death. It will also take in such of the legal representatives of the deceased who had been living with the tenant in the building as a member of his family. In other words, the *sine qua non* for such a person to become a tenant under the Act, the first requirement is that such a person should have been living with the tenant in the building as a member of the tenant's family upto the death of the tenant. Since the definition did not contemplate any person becoming a tenant after the death of the original tenant in respect of a non-residential building, the suit building being admittedly a non-residential building in which late Seetharama Rao was carrying on a hotel business when he died on 15th January, 1968, there was no other person who could come within the definition of the term 'tenant' under section 2 (8) of the Act. Therefore late Seetharama Rao's statutory tenancy came to an end with his death. Hence defendants 2 to 10, whatever their capacities and whatever their relationship with late Seetharama Rao might be, could not be termed as 'tenants' of the premises in question entitled to the protection of the Act, after the death of Seetharama Rao.

55. However, Mr. Govind Swaminathan contended that even if that be our view of section 2 (8) of the Act, still by virtue of the amendment to section 2 (8) made by the Tamil Nadu Act XXIII of 1973, defendants 2 to 10 became tenants and the law that had to be applied to a particular case was the law in force at the time of the disposal of the case and since the amendment came into force on 30th June, 1973, during the pendency of the present suit, the learned trial Judge should have, on the basis of the Act as amended, held that defendants 2 to 10 in the suit were tenants entitled to the protection of the Act. We shall now consider this contention. Section 2 (8) of the Act was substituted by a new clause by the Tamil Nadu Act XXIII of 1973 and the new clause relevant for the purpose of the present case is as follows:

"2. (8) "tenant" means any person by whom or on whose account rent is payable for a building and includes the surviving spouse, or any son, or daughter, or the legal representatives of a deceased tenant who—

(i) in the case of a residential building, had been living with the tenant in the building as a member of the tenant's family up to the death of the tenant; and ..

(ii) in the case of a non-residential building, had been in continuous, association with the tenant for the purpose of carrying on the business of the tenant up to the death of the tenant and continues to carry on such business thereafter."

The following important features can be noticed with reference to this amended provisions:

(1) For the first time it makes a provision for a non-residential building.

(2) The provisions regarding a residential building are different from the provisions regarding a non-residential building.

(3) The *sine qua non* for a person enumerated in the definition to become a tenant under the Act in respect of a residential building is that such person should have been living with the tenant in the building as a member of the tenant's family upto the death of the tenant. With regard to a non-residential building the *sine qua non* is that such a person should have been in continuous association with the tenant for the purpose of carrying on the business of the tenant upto the death of the tenant and continue to carry on such business thereafter.

56. Therefore it will be seen that even with reference to a non-residential building an enumerated relation cannot be said to be a tenant, if such a person had not been in continuous association, with the tenant for the purpose of carrying on the business of the tenant upto the death of the tenant and continued to carry on such business thereafter and all the legal representatives will not be tenants but only such of them as had been in continuous association with the tenant for the purpose of carrying on the business of the tenant upto the death of the tenant and continued to carry on such business thereafter will be tenants.

57. The argument of Mr. Govind Swaminathan is that the amended provision was in force when the learned trial Judge disposed of the suit and the suit should have been disposed of on the basis of the amended provision and that if the suit was so disposed of, defendants 2 to 10 should have been held to be entitled to the protection of the Act.

58. In this context the decision of a Bench of this Court, to which one of us was a party, in *Hajee Abdulla Sait* v. *K. D. Moorjani*[1], is relevant. The building in that case was a non-residential one and did not come within the purview of the Act before its amendment by the Tamil Nadu Act II of 1962.

On 20th February, 1961, the lease period came to an end and on 4th April, 1961, a notice by the landlord terminating the tenancy on or before 1st June, 1961 was given. The rent fixed under the lease deed was Rs. 195 per month. Since the tenant did not deliver possession the landlord instituted a suit in ejectment. On 30th November, 1961 the suit ended in an *ex parte* decree. In execution of the decree in February, 1962 the landlord took possession of the building on 12th February, 1962, through a bailiff. Two days later the landlord entered into an agreement with a new tenant stipulating a rent of Rs. 450 per month. On 5th May, 1962 an application, which had been filed by the tenant to set aside the *ex parte* decree, was dismissed. At that stage Tamil Nadu Act II of 1962 came into force on 30th June, 1962. On 29th October, 1962, a civil miscellaneous appeal filed by the fteant was allowed and the suit for eviction was restored and the landlord's civil revision petition against the order in the civil miscellaneous appeal was unsuccessful. There was an execution petition for restitution of possession. But that was held over by consent till the

1. (1975) 88 L.W. 559.

disposal of the suit. On 8th February, 1964 the suit was decreed and the execution petition was dismissed. On 10th June, 1964, Tamil Nadu Act I of 1964 came into force. However the decree for eviction was reversed in appeal on 8th December, 1964 and the appeal by the tenant was allowed. The result of this was that there was a direction for re-delivery. A second appeal to the High Court was filed against the appellate decree dismissing the suit. During the pendency of the second appeal, the tenant died on 3rd January, 1967. In view of this, it was contended before the High Court on behalf of the lessor that inasmuch as the tenancy agreement with the tenant had been brought to an end by a notice to terminate the tenancy on and from 1st June, 1961 and the suit being one in ejectment, treating the tenant as a trespasser, the legal representatives of the deceased tenant were no longer entitled to any statutory protection inasmuch as such protection was but personal to the original tenant. After extracting the definition of the term "tenant" as it stood prior to its substitution by the Tamil Nadu Act XXIII of 1973, the Bench stated:

> "It seems to us that the language of the definition appears to contemplate only a residential building and it will have no application to a non-residential building so far as it matters for the present purpose. This is because the inclusive part of the definition takes in only the surviving spouse or any son or daughter or the legal representative of a deceased tenant who had been living with the tenant in the building as a member of the tenant's family up to the death of the tenant. This was not a case of a residential building and there was no question of the respondents living with their father in the non-residential building."

Since the quondam tenant died in that case on 3rd January, 1967, before the Tamil Nadu Act XXIII of 1973 came into force, the Court held on the reasoning of the judgment of the Supreme Court in *J. C. Chatterjee and others* v. *Shri Sri Krishnan Tandon and another*[1], already referred to, that the legal representatives could not put forward any claim over that which the deceased himself could have and that as the statutory protection available to a tenant was personal to him and it came to an end on his death his legal representatives in the circumstances could only be treated as trespassers. This decision is authority for the following propositions:

(1) The definition of the term "tenant" contained in section 2 (8) of the Act before its substitution by the Tamil Nadu Act XXIII of 1973 took in legal representatives only with reference to a residential building and not with reference to any non-residential building;

(2) after the death of the tenant on 3rd January, 1967, namely, before the coming into force of the Tamil Nadu Act XXIII of 1973, his legal representatives could not claim the protection of the Act on the basis of the amendment introduced by the Tamil Nadu Act XXIII of 1973; and

(3) the position of the legal representatives was only that of trespassers.

59. Notwithstanding the above position, Mr. Govind Swaminathan contended that on the authority of another judgment of this Court in *Md. Sultan Moideen and others* v. *Official Trustee, Madras and another*[1], the learned Judge should have applied the amended section 2 (8) as introduced by the Tamil Nadu Act XXIII of 1973 to the defendants 2 to 10 and we should now apply the same and hold that defendants 2 to 10 are entitled to the protection of the Act. That was a case in which under an arrangement entered into between one Mohamed Burhanuddin Sahib and the Official Trustee under Exhibits A-1 and A-2, dated 12th May, 1961 and 4th January, 1963 respectively the former obtained a right to collect rents from a market called Connemara Market in Pudupet, Madras. When the said Mohamed Burhanuddin Sahib did not perform certain obligations imposed on him, the Official Trustee determined the lease with effect from 31st January, 1969 and called upon Mohamed Burhanuddin Sahib to surrender possession and he having filed to do so, the Official Trustee instituted a suit for recovery of possession. The suit was decreed by the City Civil

1. A.I.R. 1972 S.C. 2526.

1. (1978) 1 M.L.J. 190 : 91 L.W. 170 : A.I.R. 1978 Mad. 248.

Court, Madras and against the said decree Mohamed Burhanuddin Sahib filed an appeal to the High Court. But during the pendency of the appeal, he died on 11th May, 1972 and thereupon his legal representatives were brought on record. The High Court had to consider several questions and one of them was, whether the legal representatives were entitled to the protection of the Act. The learned Judge who disposed of the appeal did not agree with that contention and dismissed the appeal. The matter came up before a Bench of this Court consisting of Ramaprasada Rao, J., as he then was, and Suryamurthy, J., and after referring to the definition of the term 'tenant' contained in section 2 (8) of the Act before its substitution by Tamil Nadu Act XXIII of 1973 and subsequent to its substitution by the amending Act, the Bench stated with reference to the provision prior to the amendment by the Tamil Nadu Act XXIII of 1973 as follows:

"Hence, under the old Act, there was no express reference to a non-residential building, but on a fair reading of the said definition, the benefits of statutory tenancy provided for in this sub-clause could be availed of by the heirs and legal representatives of a deceased tenant provided they were also living with the deceased in the building as members of the tenant's family upto the death of the tenant. This requirement to get the statutory entitlement reflects the purpose of the Legislature. We are of the view that even under the old definition the legislature made it clear that unless the heir or the legal representatives, who project a claim to be continued as statutory tenant, establishes as a fact, that he or they was or were living with the deceased tenant, *viz.*, his or their predecessor-in-interest he or they cannot obtain the statutory benefits under the provisions of Act XVIII of 1960."

After extracting the substituted definition, the Bench proceeded to state:

"Due to such an amendment, the legislature, according to us again declared its intention by clarifying the position and by laying an emphasis upon such association of the heirs and legal representatives with the deceased tenant. On an examination of the two limbs of the definition of 'tenant' in section 2 (8) as amended in 1973, one gains the impression that in order to secure, continuity in the tenancy the heirs should prove, as a fact, that they were in the case of a residential building, residing with the deceased tenant as a members of his family till his death and equally prove in the case of a non-residential building, that they were in continuous association with the tenant for the purpose of carrying on the business of the tenant up to the death of the tenant and continued to carry on such business thereafter. It is therefore fairly clear that such a commercial association with the deceased tenant in the business or non-residential activity which was carried on by the deceased tenant in the premises is an essential *sine qua non* to claim the benefits under section 2 (8) (*ii*) of the Act. It appears to us that even after the amendment of the definition of "tenant" in section 2 (8), the Legislature maintained its legislative intent to ensure that only heirs and legal representatives who were living with or associated with the deceased tenant in the case of residential or non-residential buildings, as the case may be can claim the benefits of continuing as statutory tenants. This primordial requirement has to be complied with and if there is no proof of nexus in the matter of living or in the matter of the continued association in the quondam mercantile activity of the deceased tenant, then the heirs or legal representatives, in each of those cases, would not be entitled to the benefits of Act XVIII of 1960. If therefore, the halo of the above legislative intent pervaded the entire fabric of the particular legislation and if what had been achieved by the amendment is to declare and clarify such a pre-existing intent, then the question whether the amendment which is clarificatory in nature is retrospective in operation does not arise at all".

After referring to a few decisions, the Bench proceeded to state:

"In those cases, the proposition is well-settled that the rights of parties have to be determined as on the date of the disposal of the appeal by this Court, and that therefore, this Court has to take into account the statutory provisions as amend-

ed; in deciding the rights of parties before it as on the date of disposal".

We are of the opinion that the above observations cannot be said to be an authority for the proposition that we must apply the amended definition of the term 'tenant' to defendants 2 to 10 in the present case and hold that they were tenants entitled to the protection of the Act. With great respect, we have to point out that the above observations of the Bench with reference to the clarificactory nature of the amendment as well as the appeal being disposed of on the basis of the law as it stood so amended are purely *obiter dicta,* having regard to the facts of that case. In the first place, the learned Judges themselves pointed out that the legal representatives who were the appellants before the High Court were admittedly not associated with the deceased tenant nor were they in continuous association with the tenant for the purpose of carrying on the business of the tenant upto his death nor did they continue to carry on such business. If that be the factual position, the definition of the term 'tenant' as amended by the Tamil Nadu Act XXIII of 1973, would not be of any avail to them and therefore it was not necessary to decide whether the amended definition applied or not. Secondly, the Bench had to consider the question whether Exhibits A-1 and A-2 in that case, to which we have made reference already, were really leases at all, because the contention that was put forward on behalf of the official trustee was that they did not constitute leases, since the right given to Mohamed Burhanuddin under those documents was merely a right to collect rents from a market. The Bench held:

> "The Act, in our view, could not apply, nor could it be invoked by either party as Exhibits A-1 and A-2 do not forge the legal relationship of landlord and tenant as between the official trustee and the deceased Sahib".

On that finding, there was no tenancy at all coming within the scope of the Act and therefore there was no question of section 2 (8) of the Act, whether before its amendment in 1973 or after its amendment in 1973, being applicable to that case. Thirdly, the attention of the Bench was not drawn to the decision in *Hajee Abdulla Sait* v. *K. D. Moorjani*[1], to which we have drawn attention already.

60. The other aspect of the question to be considered is whether defendants 2 to 10 can be said to be tenants under the Act and therefore can claim protection of the Act against eviction. We have already indicated our conclusion that late Seetharama Rao had only a personal right and not a heritable or transferable right and that conclusion was arrived at on the basis of the two definitions contained in section 2 (8) of the Act, defining the expression 'tenant' which had no reference to non-residential building in regard to legal representatives and under those circumstances the status of defendants 2 to 10 was only that of trespassers on the building. In such a context, can it be claimed by defendants 2 to 10 that they became tenants by virtue of the substitution of section 2 (8) of the Act by the Tamil Nadu Act XXIII of 1973? On the premises referred to above, defendants 2 to 10 were trespassers on the building in question from 15th January, 1968 when Seetharama Rao died and they continued to be trespassers till 30th June, 1973 when the Tamil Nadu Act XXIII of 1973 came into force. The point to be considered is, is there anything in the Tamil Nadu Act XXIII of 1973, to clothe such trespassers with the status of 'tenant' under the Act entitled to the protection of the Act? We are clearly of the opinion that there is absolutely nothing in the Act either expressly or by necessary implication to clothe such trespassers with the status of tenant under the Act. This conclusion we reach independent of any question regarding the prospective or retrospective operation of the Tamil Nadu Act XXIII of 1973. We are further of the opinion that if any other conclusion is to be arrived at, it can be only on the basis of the Tamil Nadu Act XXIII of 1973 amending section 2 (8) being retrospective in operation, which it is not. As we shall show shortly, even if the amendment is held to be retrospective, it will not help the defendants on the facts of this case. The Tamil Nadu Act XXIII of 1973 received the assent of the President on 29th June, 1973 and was published in the Tamil Nadu Government

1. L.W.:59.

Gazette Extraordinary on 30th June, 1973. Section 1 (2) of the said Act stated that it shall come into force on such date as the Government may by notification, appoint. The Government issued a notification under G.O. Ms. No. 1773, Home, dated 30th June, 1973 appointing 30th June, 1973 as the date on which the said Act shall come into force. Admittedly, there is absolutely nothing in the Tamil Nadu Act XXIII of 1973 to give retrospective effect to the amendment made by way of substitution of clause (8) of section 2 by a new clause; nor is there any indication in the Act from which by implication any inference can be drawn that the Legislature intended the amendment to have retrospective operation.

61. In this context, the decision of the Supreme Court in *Moti Ram* v. *Suraj Bhan and others*[1], is apposite.

In that case, the Supreme Court was concerned with amendment to the East Punjab Urban Rent Restriction Act, 1949 made during the pendency of a proceeding. An application for eviction was made on 28th August, 1956. On that date, according to the relevant statutory provision, namely section 13 (3) (*a*) (*iii*) as it stood, a landlord can apply before the Rent Controller for an order directing the tenant to put the landlord in possession in the case of any building, if he required it for the reconstruction of that building or for its replacement by another building or for erection of other buildings. Before the tenant filed his written statement on 14th November, 1956, the said Act was amended by amending Act XXIX of 1956 on 24th September, 1956 and the amended section 13 (3) (*a*) (*iii*) was:

> "In the case of any building or rented land, if he requires it to carry out any building work at the instance of the Government or Local Authority or any Improvement Trust under some improvement or development scheme or if it has become unsafe or unfit for human habitation".

According to the Supreme Court, this amendment had substantially notified the then existing provision in section 13 (3) (*a*) (*iii*) and one of the questions the Supreme Court had to consider in the appeal was, whether the amended provision applied to the proceedings instituted prior to the amendment. Dealing with that question, the Supreme Court observed:

> "There is no doubt that if this amended provision applied to the present case respondent 1 would not be entitled to obtain an order of ejectment. It is plain that by the amendment the Legislature has imposed rigorous limitations on a landlord's right to recover possession in the case of any building or rented land. The question is whether this amendment can be said to be retrospective in operation. It is clear that the amendment made is not in relation to any procedure and cannot be characterised as procedural. It is in regard to a matter of substantive law since it affects the substantive rights of the landlord. It may be conceded that the Act is intended to provide relief to the tenants and in that sense is a beneficial measure and as such its provision should be liberally construed; but this principle would not be material or even relevant in deciding the question as to whether the new provision is retrospective or not. It is well-settled that where an amendment affects vested rights the amendment would operate prospectively unless it is expressly made retrospective or its retrospective operation follows as a matter of necessary implication. The amending Act obviously does not make the relevant provision retrospective in terms and we see no reason to accept the suggestion that the retrospective operation of the relevant provision can be spelt out as a matter of necessary implication .... Where the Legislature intends to make substantive provisions of law retrospective in operation it generally makes its intention clear by express provisions in that behalf. We are, therefore, satisfied that section 13 (3) (*a*) (*iii*) as amended cannot apply to proceedings which were pending either before the Controller or before the Appellate Authority at the time when the amendment was made."

In our opinion, this decision of the Supreme Court covers the point urged before us that the learned trial Judge should have disposed of the suit on the basis of the amended definition of the term 'tenant' brought about by

1. 1960 S.C.J. 699 : (1960) 2 S.C.R. 896 : A.I.R. 1960 S.C. 655.

the Tamil Nadu Act XXIII of 1973, and it is unnecessary to multiply authorities.

62. Under these circumstances, we are of the opinion that defendants 2 to 10 cannot be said to be tenants entitled to the protection of the Act against eviction.

63. We shall now consider the question on the assumption that the substituted definition of the term 'tenant' in section 2 (8) of the Act, as introduced by the Tamil Nadu Act XXIII of 1973 applies to the present case. On the basis of the amended provision, the person concerned should have been in continuous association with the tenant for the purpose of carrying on the business of the tenant and should carry on the business after his death also. In other words, there must be identity of the person who was in continuous association with the tenant and who subsequently carries on the business. We have already referred to the pleadings in this behalf, the plaintiff putting forward the contention that defendants 2 to 10 not being tenants under section 2 (8) of the Act and the third defendant stating that he was assisting his father in the business till his death along with his brothers and after the death of his father, late Seetharama Rao, he along with the other brothers were continuing the business and that defendants 4 and 10 were also associated with late Seetharama Rao in his business prior to his death and continuing the business after his death. However, in the proceedings sought to bring on record all the heirs of late Seetharama Rao as his legal representatives the third defendant who is the appellant before us took up a specific stand that late Seetharama Rao had left a will, that under that will defendants 2 to 10 alone are the executors and administrators. In fact, in the affidavit filed by the third defendant he categorically stated that his father had left a will dated 7th January, 1968 under which he appointed defendants 2 to 10 as executors and administrators to manage the affairs of his estate on behalf of the beneficiaries till the liabilities were cleared and the executors and trustees mentioned in the will alone were the legal representatives and they alone had to be brought on record and that by a resolution dated 25th January, 1968 the executors and trustees had appointed him to manage the affairs of the estate and to conduct legal proceedings. Even before us Mr. G. Ramaswami raised the point that the third defendant alone who was one of the nine trustees appointed by late Seetharama Rao under his will had preferred the appeal, that all the trustees will have to function together and one trustee alone cannot file the present appeal. In reply to this, the same contention was put forward before us, namely, that the third defendant had been authorised by the other trustees to act on their behalf by a resolution of the trustees dated 14th February, 1969, pursuant to clause (20) of the will. Hence there is no escape from the conclusion that on their own case, defendants 2 to 10 were brought on record as legal representatives of the deceased Seetharama Rao only in their capacity as executors and administrators under the will of late Seetharama Rao. If so, they could come into the picture only on the death of Seetharama Rao and they in that capacity could not have been associated with late Seetharama Rao in his carrying on the business during his lifetime till the date of his death. It can be further seen that out of defendants 2 to 10, the 5th defendant is H. H. Swamiji of Pajwar Mutt, residing at Pajwar Mutt, Car Street, Udipi, and 6th defendant is Sri V. T. Rangaswamy Iyengar, an Advocate of this Court, and 7th defendant is Sri S. Padmanabhan, another Advocate of this Court and by no stretch of imagination these three persons could be said to be persons in continuous association with late Seetharama Rao for the purpose of carrying on his business upto the date of his death and they were continuing to carrying on such business subsequent to his death. The 8th defendant is one Sri H. R. Vasudeva Rao whose address has been given as "Srinivasa Building, Kowtha Subba Rao Road, Poonandapet, Vijayawada-3". Taking into account every one of these things, we are clearly of the opinion that defendants 2 to 10 cannot be said to be persons who were in continuous association with late Seetharama Rao in carrying on his business till his death and who continued the business after his death.

64. We may also mention one pertinent point. We have already drawn attention to the fact that paragraph 14 of the will of late

Seetharama Rao dealt with his right in the Modern Cafe and under that paragraph he had bequeathed his business of Modern Cafe with all its branch activities to all his sons by the first and second wives equally. He provided that the same shall vest in the trustees appointed by him under the will, who shall administer the same including the business thereof until all his liabilities were discharged whereafter they shall vest in his sons. Therefore that clause clearly contemplated his business of Modern Cafe vesting in the trustees from the date of his death till the liabilities were discharged and the same business vesting in his sons thereafter. From this point of view also, it cannot be said that all his sons are now carrying on the business after the death of Seetharama Rao because it is only the trustees who are carrying on the business. It is not as if all the sons of late Seetharama Rao have been appointed as trustees also. In paragraph 2 of the will late Seetharama Rao mentioned the names of his sons. With regard to the trustees, in addition to the three persons whose names we have already drawn attention to; namely, H. H. the present Swamiji of Shri Pajwar Mutt, Sri V. T. Rangaswamy Iyengar and Sri S. Padmanabhan, Advocates of this Court, he mentions only three names of his sons, namely Sri K. Sanjiva Rao, Sri K. Balakrishna Rao and Sri K. Narayana Rao, the other three being one Sri H. T. Vasudeva Rao his brother-in-law, one Sri P. R. Seetharama Rao and one Sri A. L. Rao. Under these circumstances, it can never be said that the persons who are now carrying on the business were in continuous association with late Seetharama Rao during his lifetime until his death for the purpose of carrying on his business. Hence looked at from any point of view, even on the assumption that defendants 2 to 10 can invoke the amendment made by the Tamil Nadu Act XXIII of 1973, they cannot come within the scope of the amended definition of the term 'tenant' so as to claim the protection of the Act.

65. In view of this conclusion of ours, it is unnecessary for us to consider whether the appeal preferred by the third defendant alone describing him as executor and administrator of the estate of late Seetharama Rao impleading the other administrators and executors as respondents only is competent or not, as contended by Mr. G. Ramaswami.

66. For the reasons indicated above, we are clearly of the opinion that the decree for delivery of possession of the suit property passed by the learned Judge in favour of the plaintiff is correct. O.S.A. No. 75 of 1977 fails and is dismissed.

67. That leaves out the other appeal, O.S.A. No. 23 of 1977 preferred by the plaintiff. The only grievance of the plaintiff is against the order of the learned Judge giving three years' time for vacating the premises. The learned Judge himself has not given any reason for granting such a long time except stating:

> "Considering all the circumstances of the case and particularly the fact that a hotel is being run in the premises. I fix the time for giving vacant possession as three years from this date".

Even in respect of a hotel, we are clearly of the opinion that a period of three years is unreasonably a long one to be granted to the judgment-debtor. However, on that ground we are not interfering with that portion of the decree of the learned Judge for the reason that the third defendant has preferred an appeal to this Court and if the learned Judge had not given this time, he would have applied for and obtained a stay of execution of the decree and by the time the appeals are now disposed of, nearly 2½ years out of the said 3 years have expired and while dismissing the appeal preferred by third defendant, if the third defendant asks for time for vacating the premises, we ourselves would have given some time. In view of these circumstances, though the plaintiff had a legitimate grievance against the particular direction of the learned Judge in question and was justified in filing the appeal, we are not interfering with that direction and on that ground O.S.A. No. 23 of 1977 will stand dismissed.

68. The plaintiff will be entitled to his costs in O.S.A. No. 75 of 1977.

69. There will be no order as to costs in O.S.A. No. 23 of 1977.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

K. Periaswamy Ambalam .. *Appellant**

v.

Pichayammal and others .. *Respondents.*

Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act (XXI of 1972), *section* 3—*Cultivating tenant—Relief for arrears of rent conditional on paying the entire rent for fasli* 1381—*Non-compliance would disentitle him from statutory concessions.*

The concession given to the tenant under the provisions of the Tamil Nadu Act XXI of 1972 was conditional on his paying the entire rent for fasli 1381 within the period of six months. If he did not comply with this condition, the statutory concession could not be extended to him. [*Para.* 9.]

Case referred to:—

Semmanna Gounder v. *Mysore Mission,* (1977) 1 M.L.J. 38.

Appeal against the decree of the Court of the Subordinate Judge, Madurai in Appeal Suit Nos. 228 and 227 of 1971, preferred against the decree of the Court of the District Munsif of Madurai in Original Suit Nos. 522 of 1970 and 72 of 1970 respectively.

P. Ananthakrishnan Nair, for Appellant.

R. Damodaran and *D. Nelson,* for Respondents.

The Court delivered the following

JUDGMENT.—These two appeals arise out of appeals from two suit O.S. Nos. 522 of 1970 and 72 of 1970 respectively in the Court of the District Munsif of Madurai. The suits were filed for recovery of arrears of rent from one Karuppanan Ambalam in respect of 2 acres 12 cents and 2 acres 18 cents of land belonging to the plaintiffs and leased to the said Karuppanan Ambalam at the rate of 16 bags of paddy of 48 Madras measures in each case. The sui s related to the arrears of rent for faslis 1378 and 1379. Karuppanan Ambalam contended that the rent was only 12 bags of paddy of 48 Madras measures in each case, and when he paid the rent for faslis 1378 and 1379 the plaintiffs refused to receive the same giving false hopes to him that the amount may be settled and adjusted in the sale transaction negotiated between the parties. The trial Court held that the rent payable was 16 bags of paddy and decreed the suit for the value thereof, namely, Rs. 1,280 in each suit.

2. Karuppanan Ambalam filed two appeals and he died during the pendency of those appeals, and his legal representatives have been brought on record. During the pendency of the appeals I.A. Nos. 564 and 565 of 1973 were filed taking advantage of the provisions of Tamil Nadu Act XXI of 1972, which came to be enacted subsequent to the disposal of the suits and before the disposal of the appeals. The attempt of the tenants was to deposit the arrears of rent for fasli 1381 so that the earlier rent could be taken to have been wiped out in accordance with the provisions of Tamil Nadu Act XXI of 1972. The plaintiffs contended that the deposit of the value of 12 kalams of paddy in each case was not proper so as to discharge the arrears, and that the proper rent was 16 kalams of paddy in each of the cases. According to the plaintiffs, the value of the paddy deposited by the tenants did not represent the market value and was much less. It was, therefore, contended that the tenants had not complied with the provisions of Tamil Nadu Act XXI of 1972 so that the plaintiffs were entitled to a decree as prayed for in the suits.

3. The III Additional Subordinate Judge of Madurai, who heard the appeals, went into two questions. One was whether the suits were liable to be dismissed on the deposit of the rent for fasli 1381, and the second was whether the plaintiffs were entitled to the amount claimed by them in the suits. On both these points he decided against the tenants, and that is how the matter comes in appeal before this Court.

4. The learned counsel for the appellant contended that this a case in which the provisions of section 3 of Tamil Nadu Act XXI of 1972 would apply, that in this case, there is a *bona fide* dispute as to the amount to be deposited and that in such a case, the Court was bound to grant further time for making up the deficiency in deposit. For the respondents, the submission was that this is a case in which the actual rent had already been fixed under a decree as between the parties, against which there was no appeal, and that

*S.A. Nos. 448 and 449 of 1976. 9*th April,* 1979

this is not a case in which the tenant would be entitled to any benefit under the provisions of Tamil Nadu Act XXI of 1972 after he had failed to deposit the entire rent for fasli 1381 within the period stipulated under the Act.

5. The only question that arises for consideration is whether the tenant had complied with the provisions of Tamil Nadu Act XXI of 1972 so that the arrears of rent due for the earlier faslis would stand wiped out. Tamil Nadu Act XXI of 1972 was passed for providing relief to cultivating tenants in respect of arrears of rent. Due to default in the payment of arrears of rent, landlords took action against cultivating tenants for eviction as well as for recovery of arrears of rent. It was considered that in the interests of the general public, cultivating tenants should, at the time when the Act was enacted, be spared the distractions and expenditure involved in such action, in order that the maximum possible advantage may result to the State in the matter of production of food crops. It was, therefore, considered necessary, as part of agrarian reform, to give relief to cultivating tenants from the burden of discharging arrears of rent on condition of payment of the current rent to landlords.

6. This Act was published in the Fort St. George Gazette on 11th of August, 1972. Section 3 (1) which is the only material provision reads as follows:—

"3. *Relief in payment of arrears of rent.*—(1) (*a*). All arrears of rent payable by a cultivating tenant to the landlord and outstanding on the 30th June, 1971 (hereinafter referred to as arrears of rent), shall be deemed to be discharged; whether or not a decree or order has been obtained therefor, if such cultivating tenant—

(i) has before the date of the publication of this Act paid to the landlord or deposited in the Court or before the competent authority, to the account of the landlord; or

(ii) pays or deposits in the manner specified in clause (*b*) within six months from the date of the publication of this Act; or

(iii) is deemed to have paid or deposited under this Act

the whole of the rent due for the fasli year commencing on the 1st July, 1971 and ending with the 30th June, 1972 (hereinafter referred to as the current rent).

(*b*) A cultivating tenant may—

(i) pay to the landlord the current rent, or

(ii) deposit in the Court or before the competent authority, to the account of the landlord, the current rent or if the rent be payable in kind its market value on the date of deposit;

(*c*) The Court in which, or the competent authority before which, the deposit is made shall cause notice of the deposit to be issued to the landlord, determine after a summary enquiry, whether the amount deposited represents the correct amount of the current rent due from the cultivating tenant. If the Court or competent authority finds that any further sum is due, it shall direct the cultivating tenant to deposit the further sum within the period specified in clause (*a*) (ii). If the Court or competent authority adjudges that no further sum is due or if the cultivating tenant deposits within the time referred to above such further sum as is ordered by the Court or competent authority the cultivating tenant shall be deemed to have paid the current rent for the purpose of this Act."

7. It may be seen from the above provision that arrears of rent payable by a cultivating tenant to a landlord and outstanding on 30th June, 1971 is deemed to be discharged, if the tenant had paid before the date of the publication of the Act to the landlord or deposited in Court to the account of the landlord the whole of the rent due for the fasli commencing on 1st July, 1971, and ending with 31st June, 1972. Even in a case where the tenant had not paid the current rent before the publication of the Act or deposit the rent before the said publication, he was given time to pay the rent within six months from the date of the publication of the Act. The six months' time would expire by 10th of February, 1973. The Court or competent authority, before which the deposit is made, has to give notice of the deposit to the landlord and determine, after a summary enquiry, whether the amount deposited represents the correct amount of the current rent due from the cultivating tenant. If the Court or the competent authority found that any further sum was due, then, it has to direct the cultivating tenant to deposit the further sum within the period specified in

clause (ii) of sub-section 1 (a) of section 3. If the Court or the competent authority found that no further sum was due or if the cultivating tenant deposited the further sum found to be due within the period specified in clause (a) (ii), then the cultivating tenant is deemed to have paid the current rent for the purpose of the Act, so that the earlier rent in arrears would stand discharged or wiped out. There is no dispute about the fact that the tenant deposited the rent for fasli 1381 before the Authorised Officer, and the plaintiffs had withdrawn the amount. The amount so deposited was Rs. 678. As mentioned earlier, there was dispute as to the quantum of rent payable by the tenant to the landlords in these cases. The quantum was fixed under O.S. No. 18 of 1969 and the rent fixed in the said suit was 16 bags of paddy each containing 48 Madras measures. The tenant was, therefore, obliged to pay the landlord 16 bags of paddy in each of these cases, while in I.A. Nos. 564 and 565 of 1973 he stated that he had deposited the value of only 12 bags of paddy. The market value of the 16 bags of paddy was Rs. 1,280, and as the deposit was only Rs. 678 in each of these cases, the Court below came to the conclusion that the tenant had not deposited the *entire rent* as contemplated by section 3 of Tamil Nadu Act XXI of 1972. *Prima facie* there appears to be no error in the judgment of the lower appellate Court.

8. The learned counsel for the appellant, however, drew my attention to a decision of this Court in *Semmanna Gounder* v. *Mysore Mission by its power Agent Rev. Father Uthrium*[1]. That was a case which came to this Court in a petition to revise the order of the Authorised Officer by which the Authorised Officer had dismissed an application by a tenant filed for a declaration under section 3 (1) (b) (ii) of Tamil Nadu Act XXI of 1972 that he had discharged the entire arrears due to the landlord by reason of the deposit of current rent. The deposit in that case was made on 9th of February, 1973 with an application for declaration that the entire arrears had been wiped out by reason of such deposit. The landlord disputed the correctness of the amount deposited and contended that the rent payable for each fasli was Rs. 360 and not Rs. 300. The Authorised Officer enquired into this matter, and ultimately accepted the contention of the landlord and held that the rent payable was Rs. 360. Finding that only a sum of Rs. 300 had been deposited and taking the view that he had no authority under the provisions of the Act to extend the time for depositing the balance amount, he dismissed the application. It was against that order that the revision petition came to be filed in this Court. The learned Judge held that that was a case in which the time taken for paying the additional amount could be excluded in calculating the period of six months.

9. I consider that this decision has no application to the facts of the present case. In that case, there was a dispute as to the quantum of the rent payable to the landlord. The quantum had to be determined, and on such determination, some excess was found to be due to the landlord. The question was whether the tenant was entitled to any further time for payment of the excess amount. It is on these facts that the Court held that the time taken for determination of the amount due could be excluded. As pointed out earlier, in this case, the civil Court has fixed the rent and the fixation has become final. The tenant had only to deposit the rent so fixed. There is no possibility of any time being taken for the determination of the rent by any authority so as to justify its exclusion as in the case cited. The omission to deposit the entire rent on these facts is fatal to the tenant's claim for deeming the earlier rent in arrears to have been wiped out. The concession given to the tenant is conditional on his paying the entire rent for fasli 1381 within the period of six months. If he did not comply with the condition, the statutory concession cannot be extended to him. In this view, it is unnecessary to go into the question raised during the arguments whether the time limit fixed in section 3 (1) (b) is unalterable without there being any scope for extending the time-limit or excluding any time taken in other proceedings. The arrears here are not wiped out. The suits for arrears were rightly decreed.

10. The appeals are dismissed with no order as to costs.

S. J. —— *Appeal dismissed*

1. (1977) 1 M.L.J. 38.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

M. Arumugam Pillai .. *Petitioner**

v.

K. S. Kullappan .. *Respondent.*

Tamil Nadu City Tenants' Protection Act (III of 1922), section 2 (1)—Decree for possession and for arrears of rent of non-residential building—G O. Ms. No. 1285, Revenue, dated 31st May, 1975 coming into force—Benefits of the Act extended to non-residential buildings in the municipal area of Kumbakonam—Application by defendant to declare decree as not executable—Application dismissed as also appeal therefrom—Revision by defendant—Decree for possession held non-executable.

The plaintiff obtained a decree for possession and for arrears of rent in respect of a non-residential building within the municipal area of Kumbakonam on 28th August, 1974. Subsequent to this, G O.Ms. No. 1285, Revenue, dated 31st May, 1975 came into force by which the benefits of the Tamil Nadu City Tenants' Protection Act (III of 1922) were extended to the non-residential buildings in the municipal area of Kumbakonam. Taking advantage of the G.O. the defendant filed an E.A. praying for an order that the ecree for possession cannot be executed. This application was dismissed. The defendant filed an appeal before the Sub-Judge of Kumbakonam which was also dismissed. On revision to the High Court,

Held: A reading of section 3 of Madras Act XVI of 1964, leaves no room for doubt that except in a case where the decree or order passed has been executed or satisfied in full before the date on which the notification takes effect; the rights and privileges which may have accrued to the landlord in respect of a building used for non-residential purposes shall cease and determine and shall not be enforceable. If this is kept in mind, there is no difficulty in coming to the conclusion that the decree in question cannot be enforced in view of the subsequent G.O. extending the provisions of the Act to the building in question. Accordingly, the revision was allowed in part, in that the decree for possession shall determine and shall not be enforced. The decree for arrears of rent will stand. [*Para.* 5.]

*C.R.P. No. 1360 of 1977. *9th August,* 1978.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordiante Judge, Kumbako am, dated 22nd February, 1977 and made in C.M.A. No. 21 of 1976. (E.A. No. 445 of 1975 in O.S. No. 332 of 1973, District Munsif Court, Kumbakonam).

B. Rajagopalan, for Petitioner.

K. Raman, for Respondent.

The Court made the following

ORDER.—The defendant in O.S No. 332 of 1973 on the file of the District Munsif of Kumbakonam, is the petitioner in this revision. The respondent herein is the plaintiff in the suit. On 28th August, 1974, the plaintiff obtained a decree for possession and for arrears of rent against the defendant. There is no dispute before met hat there are structures standing on the land in question and the structures would come within the definition of 'building' used for non-residential purposes, within the meaning of the provisions of Tamil Nadu City Tenants' Protection Act (III of 1922), hereinafter referred to as the Act, as they stand amended. At the time when the decree came to be passed in the suit, the benefits of the Act were not extended to non-residential buildings in Kumbakonam Municipal area, where the property in question is situate. There is also no dispute before me that by G.O. Ms. No. 1285, Revenue, dated 31st May, 1975, the benefits of the Act were extended to non-residential buildings in the Municipal area of Kumbakonam. Taking advantage of the extension to the Municipal area of Kumbakonam, the defendant filed E.A. No. 445 of 1975 under sections 47 and 151 of the Code of Civil Procedure, praying for an order that the decree in the suit is not executable in view of the provisions of the Act having been made applicable to the building in question. The District Munsif, Kumbakonam, did not countenance the plea of the defendant and his application was dismissed. The defendant filed an appeal, C.M.A. No. 21 of 1976, which was heard and disposed of by the Subordinate Judge of Kumbakonam and the appellate Court also repelled the contentions of the defendant and the appeal was dismissed. The present revision is directed against the orders of the appellate Court.

2. The question that comes up for consideration in the present revision is what is the impact of the extension of the

provisions of the Act to non-residential buildings by the G.O. concerned, after the decree in the suit has been passed, but before it has been executed anterior to the date on which the concerned notification had taken effect. Section 2 (1) of the Act defines 'building'. As it originally stood enacted, the section read as follows —

> "In this Act unless there is anything repugnant in the subject or context—
>
> (1) 'Building' includes a house, out-houses, stable, latrine, shed, hut, and any other such structure, whether of masonry, bricks, wood, and metal or any other material whatsoever".

There has been an amendment introduced by Madras Act XIII of 1960 and the definition introduced reads as follows:—

> "(1) 'Building' means any building, but or other structure, whether of masonry, bricks, wood, mud, metal or any other material what soever used.
>
> (*i*) for residential or non-residential purposes, in the city of Madras, in the Municipal towns of Coimbatore, Madurai, Salem and Tiruchirapalli and in any village within five miles of the City of Madras or of the municipal towns aforesaid, and
>
> (*ii*) for residential purpose only, in any other area and includes the appurtenances thereto".

This definition clause has been further amended by Madras Act XVI of 1964 and after the amendment introduced by the said Act, the definition of 'building' reads as follows:—

> "(1) 'Building' means any building, hut or other structure, whether of masonry, bricks, wood, mud or metal or any other material whatsoever used—
>
> (*i*) for residential or non-residential purposes in the City of Madras, in the municipa towns of Coimbatore, Madurai, Salem and Tiruchirapalli, or such other municipal town as the Government may, by notification, specify, and in any village within five miles of the city of Madras or of the municipal towns or town aforesaid.
>
> (*ii*) for residential purposes only, in any other area; and includes the appurtenances thereto."

3. Unless and until a notification extending the provisions of the Act to buildings used for non-residential purposes those specifically mentioned in section 2 (1) (*i*) of the Act, the rights, privilege and benefits of the Act cannot be claimed by such a tenant within the meaning of the Act. The fact remains that in the present case the notification was publiished only on 31st May, 1975, after the decree in the suit came to be passed on 28th August, 1974. How this notification affects the rights and privileges which have accrued to the landlord prior to the taking effect of the notification is set out by section 3 of Madras Act XVI of 1964 which reads as follows:—

> "Certain pending proceedings to abate—
>
> Every proceeding instituted by a landlord in respect of any non-residential building or part thereof situated in any municipal town specified in the notification issued under sub-clause (*i*) of clause (1) of section 2 of the principal Act as amended by this Act and the villages within five miles of such municipal town and pending before any Court or other authority or officer on the date on which the said notification takes effect shall in so far as the proceeding relates to any matter falling within the scope of the principal Act as amended by this Act in respect of such building or part, abate, and all rights and privileges which may have accrued to that landlord in respect of any such building or part and subsisting immediately before the date on which the notification aforesaid takes effect shall, in so far as such rights and privileges relate to any matter falling within the scope of the principal Act as amended by this Act, cease and determine and shall not be enforceable."

4. Provided that nothing contained in this section shall be deemed to invalidate any suit or proceeding in which the decree or order passed has been executed or satisfied in full before the date on which the notification aforesaid takes effect.

5. A reading of the section leaves no room for doubt that except in a case where the decree or order passed has been executed or satisfied in full before the date on which the notification takes effect, the rights and privileges which may have accrued to the landlord in respect of a building used for non-residential purposes shall cease and determine and shall not be enforceable. If this is kept in mind, there is no difficulty in coming to the conclusion that the decree in question cannot be

enforced in view of the subsequent G. O., extending the provisions of the Act to the building in question. This aspect has been omitted to be taken note of by the two Courts below and this has resulted in rendering orders which run contra to the express provisions of section 3 of Madra Act XVI of 1964. In this view, I am inclined to interfere in this revision Accordingly, the revision is allowed in part in that the decree for possession shall determine and shall not be enforced. The decree for arrears of rent will stand. It is open to the plaintiff/landlord to institute proceedings afresh for possession after satisfying the provisions of the Act, which will secure the rights of the tenant also. There will be no order as to costs.

S. J. —— *Revision partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam and M.A. Sathar Sayeed, JJ.*

P.M. Rajagopalan .. *Appellant**

v.

Mohanan and others .. *Respondents.*

Motor Accident - Liability of owner of vehicle to pay compensation—Death of person travelling in tempo due to hitting against bus—Deceased travelling unauthorisedly—Claim for compensation by deceased's heirs—Driver of tempo found to be negligent—Liability of owner only vicarious—Authorisation by owner to carry the deceased not proved—Owner not liable to pay compensation.

In this case, the vehicle (tempo) which was involved in the accident was intended to carry only goods and not any passenger. As a matter of fact, there is a statutory prohibition against allowing passengers to be carried in the vehicle. Admittedly a tempo is only a goods vehicle. Therefore, even if the deceased had been permitted to travel in the tempo by the driver, that has not been shown to be with the concurrence or knowledge of the owner of the vehicle. Such permission can be inferred only when the deceased is shown to have been employed by the owner of the vehicle in connection with the carriage of goods by the tempo. In this case there is no material to indicate that the deceased was travelling in the tempo in connection with the goods carried in that vehicle. In the absence of any material to indicate that the deceased was travelling in the tempo in the course of his employment with the owner of the goods which were carried in the vehicle, the vicarious liability arising out of the accident cannot be imposed on the owner of the vehicle. Though the driver of the vehicle who caused the accident is liable to pay the compensation, the liability of the owner is only vicarious and that vicarious liability can be imposed only if he has authorised the driver of the vehicle to carry the deceased in the tempo. In this case, no such authorisation has been proved. [*Para.* 6.]

Here, the vehicle in question was a goods vehicle and there is a statutory prohibition for persons being carried in the goods vehicle. If the driver of the lorry has permitted the deceased to travel in the goods vehicle, that will be against the statutory provisions and also without due authority from the owner of the vehicle. Therefore even if the accident has occurred as a result of the rash and negligent driving of the tempo, the owner of the vehicle may not be held liable though the driver of the vehicle can be made liable as a person who had committed the tortious act. [*Para.* 8.]

Cases referred to:—

Narayanan v. *State Palm Gur Sammelan*. (1974) 87 L.W. 395: A.I.R. 1974 Mad. 281; *Commonwealth Assurance Ltd.* v. *Rahim Khan Sahib*, (1971) 84 L.W. 387: (1971) A.C.J. 295: 41 Comp. Cas. 727: A.I.R. 1971 Mad. 415

Appeals against the order of the Motor Accidents Claims Tribunal, Court of Small Causes, Madras, dated 15th October, 1974 and made in O.P. No. 615 of 1972.

S. Veeraraghavan, V. Srinivasan and *S. Balasubramaniam*, for Appellant.

M. Krishnaswami, for 1st Respondent.

K.C. Srinivasan, for 3rd Respondent.

The Judgment of the Court was delivered by

Ramanujam J.—On 15th February, 1972 at about 2-30 P.M at Bodyguard Road, near Stanley Viaduct, Madras, one Munuswamo was travelling in the tempo, MSL 7442 from

*A.A.O. Nos. 715 of 1974 and 480 of 1975.

7th April, 1978.

Parrys towards, Mount-Road. At that time, a bus belonging to the Pallavan Transport Corporation, collided with the said tempo. As a result of this accident, the said Munuswamy died. The brothers of the deceased filed O.P. No 615 of 1972 claiming compensation of Rs. 50,000 on the ground that the accident had occurred as a result of the rash and negligent driving of the two vehicles by the drivers under section 110-A of the Motor Vehicles Act. That claim was resisted by the Pallavan Transport Corporation contending that the accident was not due to the rash and negligent driving of the Pallavan Transport Corporation bus driver but because of the negligence of the deceased and the driver of the tempo MSL 7442. It also contended that the claim was excessive. The owner of the tempo contended that the claimants are not the heirs of Munuswamy, that the deceased was not employed under the 2nd respondent, that he had no right to travel in the tempo, that the deceased jumped into the tempo at a traffic stop surreptitiously of which the driver was not aware, and that, therefore, he is not liable to pay any compensation in respect of the said accident. He also contended that the damages claimed is excessive. The 3rd respondent in the O.P., the Insurance Company with which the tempo has been insured, contended that it is not liable to indemnify the 2nd respondent as the tempo was driven by the person who had no valid licence to drive the vehicle and, therefore, the petition is not maintainable as against the Insurance Company. The 3rd respondent also contended that the tempo was not used in accordance with the terms and conditions of the policy and that in any event the amount claimed was excessive.

2. On these rival contentions, the Tribunal had set out the following two points for consideration:—

1. Whether the accident was due to the rash and negligent driving of the tempo and/or the P.T.C. Bus, causing the death of Munuswamy.

2. If so, what is the amount of compensation that is payable to the petitioners and by whom.

3. On the first point as to whether the accident was due to the rash and negligent driving of the tempo and/or the P.T.C. Bus, the Tribunal, after analysing the evidence of P.W. 4, one Prakasam, an eye witness, and of the Sub-Inspector of Police, P.W. 2. who investigated the case, and of P.W. 6, the driver of the P.T.C. Bus held that the driver of the tempo was alone responsible for the accident. As regards the responsibility of the Insurance Company to meet the claim made by the petitioners, the Tribunal found that the driver of the tempo had not been duly licensed to drive three-wheeler, though he had a licence to drive a light vehicle and that as the tempo at the time of the accident was driven by a person, who was not licensed to drive the same the Insurance Company is not liable to meet the claim under the terms of the Insurance Policy. The Tribunal ultimately held that the owner of the tempo was liable to pay compensation for the said fatal accident.

4. As regards the quantum of compensation claimed, the petitioner's case was that the deceased was earning a sum of Rs. 15 per day for loading, unloading and delivering of the goods. But the Tribunal found that the deceased would have earned only a sum of Rs. 5 per day or Rs. 150 per month, that out of the said sum deceased would have spent a sum of Rs. 75 per month or Rs. 900 a year for the expense of the family. Taking the age of the deceased at the time of the accident as 30 and adopting the multiplier of 15 the total compensation was determined by the Tribunal at Rs. 13,500 and, after allowance for lump-sum payment, a sum of Rs. 11,000 was fixed as reasonable compensation The said award of compensation of Rs. 11,000 has been challenged in C.M.A. No. 715 of 1974 by the owner of the tempo MSL 7442.

5. The main contention advanced by the appellant in C.M.A. No. 715 of 1974 is that even assuming that the driver of the tempo was responsible for causing the accident by his rash and negligent driving, that will not make the appellant, owner of the tempo, liable to meet the compensation unless it is established that the deceased was travelling under a contract of employment with the owner or under a contract of employment with the owner of the goods carried in the tempo. It is also submitted by the learned counsel for the appellant that even assuming that the deceased travelled in the tempo with the permission or connivance of the driver of the tempo, the owner of the vehicle, cannot be made vicariously liable to meet the claim made by the petitioner from the said accident arising out of an unauthorised action of the driver.

6. In this case, the vehicle (tempo) which caused the accident is intended to carry only goods and not any passenger. As a matter of fact, there is a statutory prohibition for allowing passengers to be carried in the vehicle. Admittedly, a tempo is a goods vehicle and it is not intended to carry passengers. Therefore, even if the deceased had been permitted to travel in the tempo by the driver, that has not been shown to be with the concurrence or knowledge of the owners of the vehicle. Such a permission can be inferred only when the deceased is shown to have been employed by the owner of the vehicle in connection with the carriage of goods by the tempo. In this case, we have gone through the evidence of the 1st respondent as P.W. 3 and he merely says that the deceased used to earn Rs. 15/- per day by loading, unloading and delivering the goods. He does not say that the deceased was employed by the owner of the vehicle or by the owner of the goods carried in the tempo. In this case, at the time of the accident, the tempo was not carrying any goods. Therefore, there is no material to indicate that the deceased was travelling in the tempo in connection with the goods carried in that vehicle. In the absence of any material to indicate that the deceased was travelling in the tempo in the course of his employment with the owner of the vehicle or in the course of employment by the owner of the goods which were carried in the vehicle, the vicarious liability arising out of the accident cannot be imposed on the owner of the vehicle. Though the driver of the vehicle who caused the accident is liable to pay the compensation, the liability of the owner of the vehicle is only vicarious and that vicarious liability can be imposed only if he has authorised the driver of the vehicle to carry the deceased in the tempo. In this case, no such authorisation has been proved. The Tribunal has not gone into this aspect but had imposed the liability on the owner of the vehicle merely because the driver of the tempo was found responsible for the accident.

7. It has been held by a Division Bench of this Court in *Narayanan* v. *State Palm Gur Sammelan*[1] that there is no liability on the insurer or on the owner of a lorrry for the injuries sustained by a person who was travelling without authority in the lorry and who sustained injuries due to the negligence of the driver. The learned Judges have referred to with approval, the judgment of Ganesan J. in *Common Wealth Assurance Ltd.* v. *Rahim Khan Sahib*.[1] In the case before the Bench, a person travelled in a lorry, perhaps with the permission of the driver of the lorry. The lorry hit against a stationary lorry parked on the left side as a result of which the person travelling in the lorry got hurt resulting in fracture of his skull. In relation to that accident the insured person claimed compensation of Rs. 35, 000/- for pain and suffering, loss of income and loss of employment, and for medical expenses, past and future. On behalf of the claimants, it was contended that the deceased was loading certain goods in the lorry and on the invitation of the driver to keep him company and to look after the goods, he travelled in the lorry, that therefore, he should be taken to have travelled in the lorry at the invitation of the driver, and that therefore, the owner of the lorry is liable to compensate him for injury. The question which the Court had naturally to consider was whether a person who travels in a lorry without the authority of the owner and not in the course of his employment would be entitled to any compensation when the lorry meets with an accident due to the negligence of the driver. The Court found in that case that the injured person did not travel in the lorry with the consent of the driver or in the course of his employment with the owner of the vehicle. It is only in that connection the Court pointed out that if the person was not in employment and if he was travelling without authorisation, there is no provision in the Motor Vehicles Act to protect such a person, that the Rules framed undert he Motor Vehicles Act prohibit travel by any person as a passenger in goods vehicle, and, therefore, no liability can be fastened either on the insurer or on the owner of the vehicle for the injuries sustained by such person. Ganesan, J. in *Common Wealth Assurance Co., Ltd.* v. *Rahim Khan Sahib*,[1] also held that a passenger carried by a lorry will not be covered by the Insurance Policy, unless he is proved to be a pessenger, travelling by reason of or in pursuance of a contract of employment. Though that decision was with reference to the liability of the Insurance Company with reference to section 95 of the Motor Vehicles Act the principle

1. (1974) 87 L.W. 395; A.I.R. 1974 Mad. 281.

1. (1971) 84 L.W 387: 1971 A.C.J. 295: 41 Comp. Cas. 727: A.I.R. 1971 Mad. 415.

laid down in the decision has been applied by the Division Bench in *Narayanan* v. *Madras State Palm Gur Sammelan.*[1] for determining the liability of the owner of the vehicle in relation to a person who has travelled in a goods vehicle without his authority or without a contract of employment with him. Those decisions will squarely apply to the facts of this case.

8 Here, the vehicle in question was a goods vehicle and there is a statutory prohibition for persons being carried in the goods vehicle. If the driver of the lorry has permitted the deceased to travel in the goods vehicle, that will be against the statutory provisions and also without due authority from the owner of the vehicle. Therefore, even if the accident has occurred as a result of the rash and negligent driving of the tempo, the owner of the vehicle may not be held liable though the driver of the vehicle can be made liable as the person who had committed the tortious act. We cannot therefore, agree with the decision rendered by the Tribunal. C.M.A. No. 715 of 1974 is allowed and the award of the Tribunal is set aside.

9. In view of the fact that we have held that the owner of the vehicle is not liable to pay any compensation, C.M.A. No. 480 of 1975 wherein the claimants have claimed higher compensation has to fail. The learned counsel for the claimants says that the order of the Tribunal refusing to make Pallavan Transport Corporation liable for compensation has been challenged. But the Tribunal has held that the driver of the Pallavan Transport Corporation was not negligent at all, and that he was not responsible for the accident We have also accepted that finding by holding that it is only the driver of the tempo who was responsible for the accident. Therefore, claimants can sustain their claim if at all only against the driver of the tempo but the driver of the tempo has not been made a party and no claim has been made against him. Therefore, this appeal C.M.A. No. 480 of 1975 is dismissed. There will be no order as to costs in either of the appeals.

R.S. —— *C.M.A. No.* 715 *of* 1974 *allowed*; *C.M A. No* 480 *of* 1975 *dismissed.*

1. (1974) 87 L.W. 395: A.I.R 1974 Mad. 281.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Venugopal, J.*

A.R. Ramanatha Iyer .. *Petitioner**

v.

Kondiah Naidu ... *Respondent.*

(A) *Tamil Nadu City Tenants (Protection) Act (III of* 1922), *section* 9—*Petition for ejectment by landowner—Tenant claiming protection under section* 9 —*Court fixing value of the land—Entire amount deposited by tenant—Land notified slum area—Notice given to landowner—Petition by tenant for withdrawal of his application claiming protection under the Act and for withdrawal of the amount deposited—Tenant, when can be permitted.*

(B) *Tamil Nadu Slum Areas (Improvement and Clearance) Act (XI of* 1971), *section* 11.

On the question whether a tenant can withdraw his application filed under section 9 of the Madras City Tenants Protection Act and claim refund of the amount deposited in Court as directed on a notification by Government under section 11 of the Tamil Nadu Slum Area (Improvement and Clearance) Act, 1971 relating to an area including the concerned site.

Held: As a result of the notification issued under section 11 of the Slum Areas (Improvement and Clearance) Act, the rights of the landowner are merely restricted and regulated and his right of transfer to persons before it was declared to be a slum clearance area is governed by the Rules framed under section 18 of the Act. There is no prohibition for transfer of the land or building by the owner even after the area has been declared as a slum clearance area.

[*Para.* 6.]

Section 9 (1) (*a*) (i) of the Madras City Tenants (Protection) Act, provides that when the landlord files a suit for ejectment by the tenant under section 41 of the Presidency Small Causes Courts Act, the tenant may file an application for order of Court directing the landlord to sell the land for a price to be fixed by the Court. Under section 9 (1) (*b*) the Court shall decide the minimum extent of the land which may be necessary for the

*C.R.P. No. 1995 of 1976. 24*th April*, 1979

convenient enjoyment of the tenant and fix the price. [*Para* 7.]

On deposit of the amount by the tenant into Court, the Court, under section 9 (3) shall pass an order directing the conveyance by the landlord to the tenant of the extent of land for which the price was fixed. In the instant case, the stage contemplated under section 9 (3) had not been reached and the Court had not ordered conveyance of the land by the landlord and the ejectment proceedings were still pending. Hence there was no bar for the respondent to withdraw his application filed under section 9 of the City Tenants (Protection) Act. [*Para.* 7.]

Section 9 (2) of the Madras City Tenants (Protection) Act provides that in default of payment by the tenant of any instalments fixed by the Court under section 9 (1) for the purchase of the land, the Court shall dismiss the application filed by the tenant under section 9 (1) and order repayment of the amount to the tenant. When the section provides for refund of the amount paid by the tenant even in a case where the tenant defaults in the payment of instalments fixed by the Court, there is no reason why repayment should be refused when the tenant complied with the orders of the Court and has paid all the instalments. If refund could be ordered when there is default there is no rhyme or reason to refuse refund to the tenant when he has complied with the orders of the Court and paid the amount in full. So long as there is no statutory bar for with drawal of the application filed by the tenant under section 9, and so long as the Court has not ordered conveyance of the land by the landlord to the tenant there is no prohibition for the tenant to withdraw the application and claim refund of the amount deposited in Court. [*Para.* 9.]

Case referred to:—

M/s. Hulan Bai v. *L.B. Bass & Co*, (1968) 1 S C.J. 624: (1967) 3 S.C.R. 886: A.I.R. 1968 S.C. 111.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the IV Judge, Court of Small Causes, Madras, dated 5th March, 1976 and made in M.P. No. 2240 of 1975 in M.P. No. 3165 of 1968 in Ejectment Suit No. 111 of 1968.

K. Subramania Iyer, for Petitioner.

K. Yamunan, for Respondent.

The Court delivered the following

JUDGMENT.—The civil revision petition is filed against the order dated 5th March, 1976 in M.P. No. 2240 of 1978 by IV Judge, Court of Small Causes, Madras.

2. The petitioner, respondent in the lower Court, is the landowner. The respondent, who is the petitioner before the lower Court, is the tenant. The petitioner filed under section 41 of the Presidency Small Causes Courts Act, Ejectment Suit No. 111 of 1968 on the file of the Court of Small Causes, Madras. The respondent filed M.P. No. 2165 of 1968 under section 9 of the Madras City Tenants (Protection) Act claiming protection, under the said Act and offering to purchase the land in his occupation at a price to be fixed by the Court. The Court fixed the value of the land in occupation of the respondent at Rs. 1,380 and directed him to pay the amount in thirty monthly instalments commencing from February, 1972. The respondent paid the entire sum of Rs. 2,731. In the meanwhile, the entire area of which the suit land forms part has been declared to be slum area under section 2 of the Tamil Nadu Slum Areas (Improvement and Clearance) Act, 1971 (hereinafter to be referred to as Act XI of 1971). The petitioner was also served with a notice under section 11 of the said Act. Thereafter, the respondent filed an application for withdrawal of his application filed under section 9 of the City Tenants Protection Act and also sought permission of the Court to withdraw the sum of Rs. 2,711 deposited by him to the credit of the ejectment suit. On this application, the Court held that the notification under Tamil Nadu Act XI of 1971 puts an end to the jural relationship of the landlord, and tenant and it is neither possible nor competent for the petitioner to sell the land to the respondent and as long as the sale deed has not been executed by the petitioner and the title has not passed to the respondent, it is not open to the petitioner to lay any claim to the amount in Court deposit. On these findings, the Court below ordered refund of the amount, to the respondent. Aggrieved against the order passed by the lower Court, the petitioner has come up in revision before this Court.

3. It is contended for the petitioner that since the lands have not been acquired by the Government under section 17 of Act XI of 1971, the petitioner's right, title and interest in the property are merely restricted and regulated under section 14 of the said Act and the relationship of the landlord and tenant does not cease to exist by virtue of the notification issued under section 11. It is further contended, that since the object of the Act, as seen from the preamble, is merely to provide for the improvement and clearance of slums in the State of Tamil Nadu and not to deprive the petitioner of his right, title and interest in the area declared to be a slum clearance area under section 11, there is absolutely no basis for holding that the petitioner is not competent to convey the land in favour of the respondent and order refund of the amount to the respondent. It is also contended that the respondent having offered to purchase the property and deposited the amount in pursuance of the Court order, it is not open to him to withdraw the application and claim refund of the amount.

4. It is contended for the respondent that so long as the Court has not ordered conveyance of the land by the petitioner to the respondent and the respondent has not been put into possession of the land, it is open to the respondent to withdraw the application filed under section 9 of the City Tenants Protection Act and claim refund of the amount.

5. The short question for consideration is whether the respondent can withdraw the application filed under section 9 of the City Tenants Protection Act and claim refund of the amount deposited in Court.

6. When a notification is issued under section 11 of Act XI of 1971 declaring any slum area to be a slum clearance area, the owner of the land may re-develop the land in accordance with the plans approved by the prescribed authority subject to such restrictions and conditions imposed by the prescribed authority (*vide* section 14 of the Act). Section 17 of the Act confers on the Government the power to acquire a slum area. Section 16 of the Act provides for the framing of Rules to regulate the transfer, to the persons who immediately before the declaration of that area to be a slum clearance area, were in occupation of the lands and buildings in that area. It can thus be seen that as a result of the notification issued under section 11 the rights of the landowner are merely restricted and regulated and his right of transfer to persons before it was declared to be a slum clearance area is governed by the Rules framed under section 18 of the Act. Both sides are unable to throw any light whether Rules regulating transfer have been framed under section 18. One thing appears to be clear and that is, there is no prohibition for transfer of the land or building by the owner even after the area has been declared as a slum clearance area.

7. Section 9 (1) (*a*) (i) of the Madras City Tenants (Protection) Act, provides that when the landlord filed a suit for ejectment of the tenant under section 41 of the Presidency Small Causes Courts Act, the tenant may file an application for order of Court directing the landlord to sell the land for a price to be fixed by the Court. Under section 9 (*i*) (b) the Court shall decide the minimum extent of the land which may be necessary for the convenient enjoyment of the tenant and fix the price. The Court should then order the tenant to deposit the amount in Court in one or more instalments within the prescribed time. On payment of the amount by the tenant, the Court under section 9 (3) shall pass an order directing the conveyance by the landlord to the tenant of the extent of the land for which the price was fixed in the present case, the stage contemplated, under section 9 (3) has not been reached. The Court has not ordered conveyance of the land from the landlord and the ejectment proceedings are still pending. There is no bar for the respondent to withdraw his application filed under section 9 of the City Tenants (Protection) Act offering to purchase the land for a price fixed by the Court. The Supreme Court in *M/s. Hulan Bai* v. *L.B. Bass* & *Co.*[1], has held that Order 23, rule 1, Civil Procedure Code requires the Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with the case. Different considerations will arise only where set-off has been claimed or a counter-claim has been made. Since the petition under section 9 is filed by the tenant in an ejectment suit filed against him, Order 23, rule 1 will apply to the petition under section 9 (1) of the Madras City Tenants (Protection) Act. As there is no possibility of any set-off or counter-claim in the proceedings initiated under section 9 of the Madras City Tenants (Protection) Act it follows that it is open to the tenant to withdraw the petition filed by him under section 9.

1. (1968) 1 S.C.J. 624: (1967) 3 S.C.R. 886: A.I.R. 1968 S.C. 111.

8. The Madras City Tenants (Protection) Act, is a beneficial provision intended for the protection of the tenant. It is always open to the tenant to waive the benefit conferred under the Act. In that view, the tenant is entitled to withdraw the petition filed under section 9 of the Madras City Tenants (Protection) Act, especially when the Court has not directed the conveyance of the land by the landlord to the tenant.

9. The next question whether the respondent is entitled to the refund of the amount lying in Court deposit. Section 9 (2) of the Madras City Tenants (Protection) Act provides that in default of payment by the tenant of any instalments fixed by the Court under section 9 (1) for the purchase of the land, the Court shall dismiss the application filed by the tenant under sub-section (1) and order repayment of the amount to the tenant. When the section provides for refund of the amount paid by the tenant even in a case where the tenant defaults in the payment of instalments fixed by the Court, there is no reason why repayment should be refused when the tenant has complied with the orders of Court and has paid all the instalments. If refund could be ordered when there is default, there is no rhyme or reason to refuse refund to the tenant when he has complied with the orders of the Court and paid the amount in full. So long as there is no statutory bar for withdrawal of the application filed by the tenant under section 9, and so long as the Court has not ordered conveyance of the land by the landlord to the tenant, there is no prohibition for the tenant to withdraw the application and claim refund of the amount deposited in Court. Learned counsel for the petitioner contended that section 9 (2) providing for refund of the amount applied only when there is a default and not when there is compliance with the Court's order regarding payment. It is quite incongruous and illogical to suggest that the tenant is entitled to refund when he commits default in payment of instalment and he is not entitled to refund when he has complied with Court's order and paid the amount in full. The contention of the learned counsel fails and is accordingly rejected.

10. Learned counsel for the petitioner next contended that the respondent having filed an application offering to purchase the property and having deposited the amount in Court, he is estopped from withdrawing his application filed under section 9. The acceptance of the offer made by the respondent to purchase the land and the amount of price to be paid for the land are matters which are regulated by statute and the principle of estoppel cannot be applied where the respondent has merely acted under statutory provisions. The order of the lower Court is confirmed and the civil revision petition stands dismissed. No costs.

R.S. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

M. Manohara Chetty and others .. *Appellants**

v.

M/s. C. Coomaraswamy Naidu and Sons, Madras .. *Respondent.*

(*A*) *Indian Evidence Act* (*I of* 1872), *sections* 31 *and* 17—*Admissions made by a party to a proceeding regarding a fact—When and to what extent constitutes evidence.*

(*B*) *Civil Procedure Code* (*V of* 1908), *Order* 41, *rule* 22—*Cross—appeal or Cross-objection when need not be filed.*

The law by no means regards admissions as conclusive proof of the matters admitted. This is because to a Court of law admissions are but statements which do no more than *suggest* an inference as to some fact or facts in issue. It is therefore, important that the Court should examine any given admission inside out to see if it suggests any clear inference on the fact in issue against the party making it. For a Court to draw adverse inference against a party on the basis of what he is stated to have admitted, the admission must be unequivocal. It must also be comprehensive. It must go the whole-hog, as it were, on the point at issue. If a party's admission falls short of a fact in issue, such an admission would be a truncated admission. It follows that in such a case it cannot support a valid judicial determination, unless it be that the Court is in a position to find other evidence before it to make up for the deficiencies in the admission. [*Para.* 10.]

The respondent to an appeal has no need to file a regular cross-appeal or even a cross-

*S. A. No. 142 of 1976 and Memo. of objections.
29th June, 1979.

objection if all that he desires is to support the lower Court's decree in his favour on a ground decided against him by that Court. For it is open to him to urge in the other party's very appeal that the finding of the Court below against him on any given aspect ought to have been in his favour. [*Para.* 13.]

Appeal against the decree of the I Additional Judge, City Civil Court, Madras in Appeal Suit No. 235 of 1973, preferred against the decree of the Court of the IV Assistant Judge, City Civil Court, Madras in Original Suit No. 1671 of 1970.

M.P. Subramanian, D. Badradri and *B. Jagadeesan* for Appellants.

M.V. Krishnan and *R. Pandian*, for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for injunction. The subject-matter of the suit is a verandah in a building in N.S.C. Bose Road, Madras City. The first appellant Manohara Chetty, is the owner of the building. The building has a ground floor and a first floor. The first floor has four rooms and a verandah. The respondent, a book-selling firm, is a tenant of the appellant. According to the appellant, the respondent's tenancy comprised the four rooms on the first floor, excluding the varandah. The 1st appellant came to Court and asked for an injunction against his tenant, the respondent, because, according to him, the respondent was attempting to occupy even the first floor verandah which was not part of the tenancy in his favour.

2. The respondent resisted the suit, asserting that its tenancy comprised the whole of the first floor, and this included the verandah as well.

3. The trial Court recorded a finding that the respondent's tenancy of the first floor included the verandah and hence there was no question of the respondent interfering with any one else's possession in that portion. On this basis, the trial Court dismissed the suit. On appeal, the appellate Court disagreed with this finding of the trial Court. The appellate Court found that only four rooms in the first floor had been let out to the respondent, and the verandah had always been retained with the owner. Notwithstanding this finding as to the subject-matter of the tenancy, the appellate Court proceeded to confirm the dismissal of the suit on another ground, namely, on the aspect of possession. On this aspect the appellate Court recorded a finding that the first appellant was not in possession of the verandah on the date of the suit. According to the appellate Court, the verandah was in the possession of the respondent, as on the date of the suit, the respondent having earlier trespassed into that portion.

4. The first appellant's case had been that he had let out the verandah to the 2nd appellant. The appellate Court did not reject this case of the 1st appellant, but recorded a finding that the respondent had dispossessed the 2nd appellant from the verandah. This finding was sought to be supported by reference to what the appellate Court recorded as admissions made by the first and second appellants while giving evidence at the trial.

5. The finding, which the appellate Court has rendered in the manner aforesaid, is canvassed by he appellant-landlord in this second appeal. His learned counsel, Mr. M.P. Subramanian, while relying on the appellate Court's favourable finding that the respondent had no claim on the verandah as a tenant, did not urge that that finding concluded the case in the appellant's favour. Learned counsel was quite alive to the position that he had to dislodge the appellate Court's finding that the verandah was in the respondent's possession, for it was vital for the appellant to establish his own possession of the verandah as on the date of the suit in order to ask for an injunction from the Court in his favour.

6. Ordinarily, a finding as to possession must be regarded as a finding of fact, but even a finding of fact can be upset in second appeal on the score that there was no evidence to support it or that it was based on a misconception.

7. For recording the finding that neither the first appellant nor the second appellant was in possession of the verandah as the date of the suit, the appellate Court relied, out and out, on what it considered to be their admissions in the witness-box. Referring to the evidence of the 1st appellant the appellate Court observed:

> "P.W. 2 stated that the defendant had trespassed into the room" (verandah).

Referring to the testimony of the 2nd appellant the appellate Court said:—

"In fact, P.W. 3 has admitted that he was driven out of the suit premises".

8 The argument of Mr. Subramanian before me was that the so-called admissions, which the appellate Court has attributed to the 1st and 2nd appellants, do not amount to proof, in law, that on the date of the suit it was the respondent who was in possession of the verandah, and not the appellants. According to learned counsel the 1st appellant's statement that the respondent 'had trespassed into the room' cannot be equated to a full-scale admission on his part that the respondent having trespassed into the verandah, had held fast to it and remained in possession as on the date of the suit. Referring to the evidence of the 2nd appellant, Mr. Subramanian submitted that all that the 2nd appellant had admitted was that he was physically manhandled out of the verandah. This statement, according to learned counsel, cannot amount to a comprehensive admission that the second appellant was altogether dispossessed of the verandah, under his tenancy.

9. I find considerable force in learned counsel's argument. Manifestly, the appellate Court's finding on the vital issue of possession is based wholly and exclusively on what it regarded as self-defeating admissions on the part of the 1st and 2nd appellants. The Court did not find, and did not rely on, any other piece of evidence or material on record to support its conclusion. It is, therefore, pertinent to examine, in this second appeal, whether the appellant's admissions, such as they were, constitute evidence on which any judicial Tribunal, properly instructed in the law, could have legitimately rested its determination that possession of the suit verandah was with the respondent and not with the appellants at the time of the institution of the suit.

10 The law by no means regards admission as conclusive proof of the matters admitted. This is because to a Court of law admissions are but statements which do no more then *suggest* an inference as to some fact or facts in issue. (See sections 31 and 17 of the Indian Evidence Act, 1872). It is, therefore, important that the Court should examine any given admission inside out to see if it suggests any clear inference on the fact in issue against the party making it. For a Court to draw an adverse inference against a party on the basis of what he is stated to have admitted, the admission must be unequivocal. It must also be comprehensive. It must go the whole-hog, as it were, on the point at issue. If a party's admission falls short of the totality of the requisite evidence needed for legal proof of a fact in issue, such an admission would be only a truncated admission. It follows that in such a case it cannot support a valid judicial determination, unless it be that the Court is in a position to find other evidence before it to make up for the deficiencies in the admission.

11. Turning to the so-called admissions relied on by the appellate Court in the present case, the first appellant's statement to the effect that the respondent had trespassed into the verandah can by no means lead to the one and only inference that at the time of the institution of the suit, the 1st appellant was still out of possession. This is because the 1st appellant did not say that the respondent's act of trespass occurred just before the suit or that it persisted till that date. As for the 2nd appellant's statement that he was 'thrown out' from the verandah, this cannot amount to an all-out admission that he was dispossessed of the verandah, lock stock and barrel. I am accordingly satisfied that the admissions relied on by the appellate Court, even accepting them at their face value, cannot support its determination of the issue as to possession.

12. If we disregard the appellate Court's interference from the so-called admissions of the appellant, as I have demonstrated we should, what else is there to support the appellate Court's determination on the question of possession ? The answer is, nothing.

13. The respondent had filed a cross-objections to the second appeal. In the memorandum of cross-objections the respondent seeks to canvass the appellate Court's finding that the respondent's tenancy did not include the suit verandah. I think that the procedure adopted for filing the cross-objections is based on a misconception of the respondent's forensic rights in this appeal. Under our law of civil procedure, the respondent to an appeal has no need to file a regular cross-appeal or even a cross-objections, if all that he desires is to support the lower Court's decree in his favour on a ground decided against him by that Court. For, it is open to him to urge in the other party's very appeal that the finding of the Court below against him on any given aspect ought to have been in his favour. (See Order 41, rule 22, Civil Procedure Code. I, threfore, reject

the cross-objections filed by the respondent in this case as unnecessary and misconceived, but I proceed nevertheless to consider, on the merits, the respondent's contention that the appellate Court was in error in recording a finding that the tenancy in the respondent's favour did not comprehend the suit verandah.

14. The appellants Court had set out in its judgment the materials on the basis of which it had arrived at a finding on the issue as to the subject-matter of the tenancy-a conclusion which differed from that of the trial Court. The appellate Court had referred to, and relied on, a number of documents such as property tax assessment registers, account-books and rent receipts, and these included a document or two which had been marked on the respondent's side as well. The appellate Court had also gone in to the relevant oral evidence on the subject. On a consideration of the entire evidence, the appellate Court concluded; "Therefore, the theory of the defendant that the defendant is a tenant of the entire premises has got to be rejected". This conclusion based as it is on the evidence on record, cannot be regarded as erroneous in point of law. It has not been, and it cannot be, urged that the appellate Court's finding is perverse or is otherwise vitiated by any legal flaws in reasoning.

15. In the result, the second appeal is allowed. The judgments and decrees of the Courts below are set aside. The appellants will have a decree for permanent injunction as prayed for by them against the respondent. The cross-objections filed by the ressondent is dismissed. I make no order as to costs, both in the second appeal and in the cross-objections.

R.S. —— *Second appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

V.V.P. Thangaraju .. *Appellant**

v.

K.V. Perumal Chettiar and others .. *Respondents.*

Indian Partnership Act (IX of 1932), section 43—Partnership-at-will—Date of dissolution of partnership—Notice issued by lawyer on behalf of one partner to another—Reference to stoppage of business on a particular date in the notice—Notice not to be regarded as notice of dissolution—Notice of dissolution whether can bring about dissolution retrospectively.

In the law of partnership, stoppage of the partnership business is, one thing; dissolution of partnership is another. Carrying on business is no, doubt, the purpose of partnership, and discontinuance of business ordinarily puts an end to the main partnership activity, but it does not, by itself sunder the legal relationship between the partners. Indeed, there are cases, where even after dissolution, the business may be carried on, if only for the purpose of the more beneficial winding up of the affairs of the partnership. In the present case, the lawyer's notice dated 5th July, 1965, on its terms cannot be regarded as a notice of dissolution at all, much less as a notice dissolving the firm as on 6th June, 1964. [*Para.* 6.]

Retrospectivity and retroactivity as modes of laying down legal rights and obligations *ex post facto* are privileges peculiarily given to the Legislature and within a limited field, to statutory instrumentalities, to exercise as law-givers. Parties to an agreement are not in the position of law-givers and hence they cannot strictly, alter their past by contractual terms. They can only agree upon things to be done, or to be forborne, in the here and in the hereafter. This is why it is said, very accurately, that persons who become partners cannot start their partnership with retrospective effect, that is to say, from a time before they brought themselves together in agreement. The principle must apply with equal, if not greater, force to dissolution by unilateral

*S.A. Nos. 794, 795 and 1119 of 1975.
22nd December, 1978.

notice under section 43 of the Partnership Act. Partnership, it need hardly be said, is a creature of contract between persons, and till that relationship is effectively put an end to, it subsists. In the case of partnership for a term certain the agreement itself clearly envisages that the firm should get dissolved with the expiry of the period. In the case of partnership-at-will however, the firm continues indefinitely, which is only another way of saying that it will last as long as the consensus between the partners lasts, to carry on the partnership together. When once there is dent or dissonance in that consensus, the basis requisite for its continuance goes. This is why the statute, in section 43, provides for dissolution as a certain consequence of even a mere unilateral notice by a single partner. But this necessarily implies that till the eventuality occurs the continuance of the partnership relationship is not only a verifiable fact, but is unquestionable in law. If the law were not so, and if a partner-at-will were regarded as as having the power to dissolve the partnership from an anterior date by issuing a retrospective notice, what prevents him from effecting dissolution of the firm as from the very next day after the commencement of the partnership setting at naught the entire factual duration of the firm thereafter ? The intention of section 43 is not to give the partner-at-will a right to obliterate his past relationship with his other partners to the littlest extent; the section only provides for an easy, free mode of bringing about an end to partnerships-at-will, presumably on the principle that nothing, in its nature, is intended or meant to be everlasting and even good things must have an ending. [*Para.* 13.]

Having regard to the scheme underlying partnership law as codified, and having particular concern for the nature and incidents of partnerships-at-will the provision in section 43 (2) of the Partnership Act cannot be read as entitling a partner to undo a partnership with retrospective effect. A partner-at-will can undoubtedly name a date as from which the firm would stand dissolved, but that date can in no case be prior to the date of issue of his notice. It would be proper to construe the provision only as entitling the partner to notify the dissolution *in futuro*. This way of reading the section would, no doubt, tend to give the partner-at-will a means of postponing the dissolution to a later date by unilateral declaration. But, even if he does so, he would not thereby be rendering the position of his copartners any the worse for it, which hardly would be the case if he were given the power to put an end to the partnership with retrospective effect. [*Para.* 14.]

Case referred to:—

Fazal Bhai Dhaia v. *The Custodian Evacuee Property*, (1962) 1 S.C.R. 456: (1963) 1 S.C J. 286: A.I.R. 1961 S.C. 1397.

Appeals against the decree of the District Court, Salem in Appeal Suit Nos. 103, 104 and 121 of 1974 respectively preferred against the decree of the Court of the Subordinate Judge of Salem in Original Suit Nos. 272 and 274 of 1965.

Sethuratnam, for Appellant.

R. Krishnamurthy, for Respondents.

The Court delivered the following

JUDGMENT.—These second appeals, three in number, raise a common point. They arise out of suits for dissolution of partnership filed by a partner against his other partners. Two firms are sought to be dissolved in the two actions.

2. The controversy between the parties in these second appeals is extremely limited in scope. It is about the precise date when the partnership, in the case of either firm, become dissolved. The date of dissolution becomes highly important for the purpose of determining questions relating to accounting between the parties. According to the appellant, the partnership were dissolved on 6th June, 1964. The Courts below rejected this contention. They held that the firms got dissolved on 5th July, 1965. The appellant's endeavour in these second appeals is to get the date of dissolution placed at 6th June, 1964.

3. Exactly when a partnership gets dissolved might be thought to be a question which is predominantly, if not wholly, a question of fact. In this case, however, the question has to be dealt with and determined as one of law, involving, as it does, an application of section 43 of the Indian Partnership Act, 1932 and the construction of certain notices purporting to bring about the dissolution.

4. The two firms in question in these proceedings were constituted under regular deeds of partnership. It is common ground that the

deeds did not contain any article or clause fixing the duration of the partnership. The result was that they were merely partnerships-at-will. The deeds do not also provide for any particular mode of dissolution or taking accounts. This meant that the matters relating to their dissolution were to be governed wholly by the relevant provisions of the Indian partnership Act, 1932.

5. Section 43 of the Act provides for a special mode of bringing about dissolution of partnerships-at-will. The section is in the following terms:

> "Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm ;
>
> 2. The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice."

6. In the Courts below the appellant relied on two sets of notices issued by him to the other partners as constituting notices of dissolution in terms of section 43. The first was a set of lawyer's notices dated 5th July, 1965 identically worded in the case of the two firms. The appellant relied on the following words used by the lawyer in those notices:

> "Our clients and you were running art silk business till it was stopped on 6th June, 1964".

The reference to the stoppage of the partnership businesses on 6th June, 1964 was sought to be relied on by appellant as amounting to giving to the other partners notice of dissolution effective from that date. Both the Courts below however, rejected this construction of the legal notices. I agree with their view. In the law of partnership, stoppage of the partnership business is one thing; dissolution of partnership is quite another. Carrying on business is, no doubt, the purpose of partnership, and discontinuance of business ordinarily puts an end to the main partnership activity; but it does not, by itself, under the legal relationship between the partners. Indeed, there are cases where, even after dissolution the business may be carried on, if only for the purpose of the more beneficial winding up of the affairs of the partnership. In the event, the lawyer's notices dated 5th July, 1965, on their terms, cannot be regarded as notices of dissolution at all, much less notices dissolving the firms as on 6th June, 1964.

7. The appellant then relied on a set of two telegrams which he had issued in this regard to his other partners. Both were sent by teleprinter on 29th December. 1965. The telegraphic language was identical in both cases. The appellant underlines the following words as words which brought about the dissolution of the firms on 6th June, 1964:—

> "INTIMATING THE DISSOLUTION OF PARTNERSHIP......AS ON 6TH JUNE, 1964, PURSUANT TO EARLIER NOTICE".

8. Mr. R. Krishnamoorthy, learned counsel for the respondents, however, said that on a plain reading, the telegrams merely referred to the earlier lawyer's notices dated 5th July,1965. His argument was that when those earlier notices did not, in terms talk about dissolution at all, the subsequent telegrams cannot hope to achieve dissolution by inviting a bare reference to the earlier notices, which only related to cessation of business and nothing else.

9. While I agree that a mere reference to the earlier notices can only be taken as reiteration of the appllant's assertion as to the discontinuance of business, I do not accept the implication in the argument that the telegrams stop short with a repetition of the gist of the earlier notices. For unlike as in the lawyer's notices, we find the telegrams speaking about "dissolution" of the firm, in express terms. As a matter of reasonable construction of their language, I am inclined to regard these telegrams as constituting notices of dissolution. Brevity, must be remembered, in the soul of telegrams, and because this is so, Courts, in my view, must construe them liberally supplying requisite words of their own even, to make sense. That is the way any addressee of the telegram would interpret the words, and that is the way the sender also intends and expects his words to be understood by one and all. To construe the telegrams in these cases in the way learned counsel for the respondents asks me to do would be to blind my-self to the and words, "INTIMATING THE DISSOLUTION" which were words which the appellant paid for and which he got the telegraphic authorities to send over the wires to his partners. Construing the words in the manner appropriate to telegraphic English, I am satisfied that by these telegrams the appellant unmistakably

purported to notify to his other partners the dissolution of the two firms.

10. Mr. Sethuratnam, learned counsel for the appellant, pursued this line of construction further and urged that I must accept the terms of the telegrams on their face value and proceed to hold therefrom that the firms stood dissolved on 6th June, 1964, as declared in the telegrams. I am prepared to go a little way along with learned counsel and accept that the language of the telegrams is capable of being understood as notifying the dissolution of the firms as on 6th June, 1964. But saying this as a matter of construction does not mark the end of our inquiry in this case. For the question has been raised and, therefore, requires to be answered, as to whether the telegrams dated 29th December, 1965, can, in law, bring about a dissolution of the firms as from anterior date, namely, 6th June, 1964. For an answer to this question, one has to turn to the text of section 43 of the Partnership Act.

11. Advancing arguments on the terms of section 43 of our Act, Mr. Sethuratnam said that it was quite elear that while the Legislature provided for the dissolution of partnerships-at-will by the simple expedient of a unilateral notice of dissolution by one of the partners to the rest, the Legislature also declared in thesame section as to what the effective date of dissolution would be under such a notice. Learned counsel said that in the matter of dissolution by notice, the partner may either make mention of a particular date or make no mention of any date whatever for the firm's dissolution. Sub-section (2) provided for both the contingencies. If no date is mentioned in the notice, then, according to the section, the actual date of communication of the notice must be deemed to be the effective date of dissolution. But in all other cases, that is to say, in cases where the notice specifies a given date for the purpose of dissolution, then that would, in law, mark the effective date-line for dissolution of the partnership. In such cases, learned counsel said, neither the date of issue nor the date of communication of the notice would be pertinent. They would be matters of indifference. He further urged that where the notiee mentions a given date of dissolution, it would not be open to a Court to ignore it and substitute the date of communication of the notice as the effective date of dissolution. To do so, he said, would be to go against the grain of section 43. He said that this would be the position whether the date of dissolution notified by the partner is anterior to, or subsequent to, the date of the notice itself.

12. Mr. Krishnamoorthy argued, on the other hand, that however the words of section 43 (2) might read on the surface, the statute does not and cannot countenance a partner possessing the right or the ability to terminate his partnership, with retrospective effect, by merely mentioning an anterior date in his notice of dissolution.

13. I agree with Mr. Krishnamoorthy's contention. Retrospectivity and retroactivity, as modes of laying down legal rights and obligations *ex post facto*, are privileges peculiarly given to the Legislature and, within a limited field, to statutory instrumentalities, to exercise as law-givers. Parties to an agreement are not in the position of law-givers, and hence they cannot, strictly, alter their past by contractual terms. They can only agree upon things to be done, or to be forborne, in the here and in the hereafter. This is why it is said, very accurately, that persons who become partners cannot start their partnership with retrospective effect, that is to say, from a time before they brought themselves together in agreement This principle must apply with equal, if not greater force to dissolutions by unilateral notice under section 43. Partnership, it need hardly be said, is a creature of contract between persons, and till that relationship effectively is put an end to, it subsists. In the case of partnership for a term certain, the agreement itself clearly envisages that the firm should get dissolved with the expiry of the period. In the case of partnerships-at-will, however, the firm continues indefinitely, which is only another way of saying that it will last as long as the consensus between the partners lasts, to carry on the partnership together. When once there is a dent or dissonance in that consensus, the basic requisite for its continuance goes. This is why the statute, in section 43, provides for dissolution as a certain consequence of even a mere unilateral notice by a single partner. But this necessarily implies that till that eventuality occurs the continuance of the partnership relationship is not only a verifiable fact, but is unquestionable in law. If the law were not so, and if a partner-at-will were regarded as having the power to dissolve the partnership as from an anterior date by issuing a retrospectively notice, what prevents him from effecting dissolution of the firm as from the very next

day after the commencement of the partnership setting at naught the entire factual duration of the firm thereafter?

The intention of section 43 is not to give the partner-at-will a right to obliterate his past relationship with his other partners to the littlest extent; the section only provides for an easy-free mode of bringing about an end to the partnership-at-will, presumably on the principle that nothing, in its nature, is intended or meant to be everlasting and even good things must have an ending.

14. Having regard to the scheme underlying partnership law as codified, and having particular concern for the nature and incidents of partnerships-at-will I am satisfied that the provision in section 43 (2) of the Partnership Act cannot be read as entitling a partner to undo a partnership with retrospective effect. A partner-at-will can, under the section, undoubtedly name a date as from which the firm would stand dissolved, but that date can, in no case, be prior to the date of issue of his notice. It would be proper to construe the provision only as entitling the partner to notify the dissolution *in futuro*. This way of reading the section would no doubt, tend to give the partner-at-will a means of postponing the dissolution to a later date by unilateral declaration. But even if he does so, he would not thereby be rendering the position of his co-partners any the worse for it, which hardly would be the case if he were given the power to put an end to the partnership with retrospective effect.

15. There is not much case-law on this particular topic of dissolution of partnership-at-will Lindley, 13th Edition (1971), writing on the comparable provisions of section 32 (*c*) of the English Partnership Act, 1809 says that the notice of dissolution may have to be prospective.

16. Mr. Sethuratnam brought to my notice a decision rendered by the Supreme Court which was supposedly in his favour: *Fazal Bhai Dhaia* v. *The Custodian Evacuee Property, New Delhi.*[1] He relied on the headnote which the A.I.R. carried in its report:

> "Date on which deed of dissolution is executed is date of dissolution notwithstanding that a future date is mentioned as date of dissolution" [*Para.* 10]

17. Plainly, this headnote does not help the appellant, for it does not say that a partnership-atwill can be dissolved with retrospective effect. But there is more to be said about this headnote. As I shall presently show, the headnote has got the Supreme Court's decision all wrong with the result that it completely misled learned counsel during argument. What is more, the error in the headnote had also got into the post-1961 edition of a well-known text-book on the subject. What the headnote had put down as a statement of the law contained in the judgment is the very antithesis of what the Supreme Court had written. The Supreme Court was concerned with a firm's dissolution which was brought about by a regular deed of dissolution. In that deed, the dissolution was purported to be effected as from an anterior date. The Supreme Court held that this result cannot be brought about, and the dissolution took effect only from the date of the deed. The relevant passage at paragraph 10 of the Supreme Court's judgment reads as under:

> "The next contention raised in the appeal is.... that in view of section 43 of the Indian Partnership Act the partnership stood dissolved from 2nd November, 1948....The deed of dissolution was dated 12th August, 1949 .....The mention of the date 2nd November, 1948, as the date of dissolution cannot, therefore, be accepted. The firm must, however, be held to have been dissolved on 12th August, 1949 on which date the deed of dissolution was executed".

If even in a consensual dissolution by a deed signed by all partners, the firm cannot be dissolved with retrospective effect, there is an *a fortiori* justification for the view that a unilateral notice by a partner in a partnership-at-will cannot effectuate the firm's dissolution as from an anterior date.

18. I had earlier held that the appellant's telegrams dated 29th December, 1965 to his co-partners constitute notices of dissolution. The only part of the notices which the law cannot give effect to is the antecedent date set down therein as the date of dissolution. *Sans* this date, the notices must, in my opinion, be treated as notices which do not fix any particular date as the date of dissolution. For this construction to be adopted we have the example of the Supreme Court's decision in the case I have cited. It follows, therefore, that the appellant's telegrams in this case must be regard-

1. (1962) 1 S.C.R. 456: (1963) 1 S.C.J. 286: A.I.R. 1961 S.C. 1397.

ed as effectuating the dissolution of the two firms as from the date of delivery of the the telegrams. The receipt of the telegrams by other partners is not disputed. If would therefore, be proper to mark the date of dissolution of the two firms as 20th December, 1965.

19. The Courts below, however, had quite a different assessment of the legal position emerging from the appellant's notices. According to them, the appellant's notices resulted in placing the dissolution date as 5th July, 1965. The Courts below had plumped for this date, apparently because this was the day on which the initial, legal notices were issued by the appellant to his other partners. But, as I had earlier explained, the lawyer's communications of 5th July, 1965, contained no notice of termination of the partnerships. All they did was to proclaim that the businesses were stopped from 6th June, 1954. If then, the lawyer's notices were not notices of dissolution, the date of their issue or even the actual date of their communication to the other partners can have no validity or significance as notices of dissolution under section 43.

20. I have no doubt in my mind that in this case the dissolution of the two firms was brought about only by the appellant's telegrams dated 17th December, 1965, and the dissolution took effect from the dates of their communication to the partners, on which there seems to be no dispute, which is 20th December, 1965.

21. So while rejecting the appellant's contention that the firms must be held to have been dissolved as on 6th June, 1964, I must modify the finding of the Courts below and hold that the dissolution took effect on 20th December, 1965. Subject to this modification of the decree of the Courts below, the appeals are dismissed. There will, however, be no order as to costs.

R.S. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail and S. Mohan, JJ.*

Manivannan .. *Appellant**

v.

His Excellency the Lt. Governor, Pondicherry State, representing the President of the Indian Republic and others .. *Respondents.*

Constitution of India (1950), *Articles* 300, 293—*Government of Union Territories Act* (*XX of* 1963), *section* 55—*Suit for compensation against Government of Pondicherry—Proper party to be impleaded is Government of India.*

In a suit for compensation against the Government of Pondicherry the plaintiff impleaded (1) the Lt. Governor representing the State of Pondicherry and representing the President of the Republic of India (2) the Chief of Contributions Department of the Pondicherry State and (3) the Secretary, Finance Department, Pondicherry State. The suit was dismissed by the trial Court. On appeal by the plaintiff,

Held: In a suit connected with the administration of a Union territory like Pondicherry the party to be impleaded is the Government of India. In view of the fact that in the instant case, the proper party against whom the appellant claimed relief had not been impleaded as a party to the suit, the suit could not have been proceeded with against the defendants who were actually impleaded to the suit. Hence, whatever may be the merits of the claim of the appellant, since he could not claim any relief against the three defendants whom he had actually impleaded as parties in the suit, even if he had succeeded in establishing his claim, the suit by the appellant was rightly dismissed though for different reasons. [*Paras.* 8 *and* 10.]

Appeal against the decree dated 30th December, 1972 of the District Judge (II Additional), Pondicherry in Original Suit No. 32 of 1969.

J. Stainslas and *N. Rajaram*, for Appellant.

The Government Pleader, Pondicherry, for Respondents.

*App. No. 98 of 1975. *19th June,* 1979.

The Judgment of the Court was delivered by

Ismail, J.—The plaintiff in O.S. No. 32 of 1969 on the file of the Court of the Second Additional District Judge, Pondicherry is the appellant herein.

2. The suit was instituted by the Appellant for recovery of a sum of Rs. 1,63,180 on the following allegations:—

3. The appellant became the successful bidder on 18th December, 1963, for toddy shop No. 1 of Villianur Commune for a duration of there years from 1st January, 1964 against sum of Rupees Forty-five thousand and five hundred and eighty three per year and the toddy shop had worked well during the year, 1964 and taxes due to the Government have been fully and regularly paid; as per order dated 14th April, 1965, the Government has declared the licencee as deprived of his right of auction and ordered the closing of his shop for the reason that he has not paid the taxes for the months of March and April, 1965 and that he had committed several petty offences; really the Government had intended at any cost to bring the appellant to ruin and even to make him quit the Pondicherry State because he was not willing to bow before some people; on 16th April, 1965, the Contribution Department had affixed seal on the shop; on the 17th of the same month, on the order of the Chief of Contributions Department, the employees of the Department, accompanied by policemen and military men have effected the removal by some tree climbers of the pots of toddy and got the spathes out and damaged; on appeal by him, the High Court of Judicature, Madras, has by its appellate judgment dated 30th April, 1965 quashed the order dated 14th April, 1965; following notification of the said appellate judgment, the Government has got the seals removed from the shop; but it had not been possible to run the shop after the cutting of the spathes as there was no production of toddy; the appellant had sustained heavy losses through the illegal acts of the Department; and he had hurt his business, lost enormous sums paid to the owners of the trees, those paid to the workers and his own profit. It is on these allegations he put forward a claim of Rs. 1,63,180/- as compensation.

4. To this suit, he had impleaded the following as defendants; (1) The Lt. Governor representing the State of Pondicherry and representing the President of the Republic of India; (2) The Chief of Contributions Department of the Pondicherry State; and (3) The Secretary, Finance Department, Pondicherry State.

5. The defendants put forward a number of defences to which it is unnecessary to refer in view of the narrow compass within which we propose to dispose of the appeal, and ultimately the learned Second Additional District Judge dismissed the suit. It is against this dismissal the present appeal has been preferred by the plaintiff in the suit.

As soon as the learned counsel for the appellant opened the appeal, we asked the learned counsel as to how the appellant could sustain his claim for compensation from the three defendants to the suit as mentioned above. The learned counsel represented that the appellant was suing only the Government of Pondicherry for compensation for the damage done to him by the illegal acts of the officers of the Pondicherry Government. We pointed out to him that the impleading of the defendants did not indicate that the appellant was suing the Government of Pondicherry and on the other hand, it would give an impression that the appellant was suing the three defendants personally. In fact, the plaint itself shows that the appellant was suing the three defendants in their respective capacities as indicated in the cause title itself. If so, the appellant was not certainly suing the Government of Pondicherry. If the intention of the appellant was to sue the Government of Pondicherry, he had not impleaded the Government of Pondicherry as a defendant as prescribed by law.

6. In this contest, it is necessary to refer to the relevant constitutional and statutory provisions. Article 300 of the Constitution deals with suits and proceedings and clause (1) of the said Article states:

> "(1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

7. There is a separate part in the Constitution namely Part VIII dealing with the Union, Territories. Article 239 is one of the Articles included in that part. Clause (1) of Article 239 states:

> "(1) Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify."

8. The Parliament has enacted the Government of Union Territories Act, 1963, *i.e.*, Central Act XX of 1963. Section 55 of this Act deals with contracts and suits.

This section states:—

For the removal of doubts it is hereby declared that—

> "(*a*) all contracts in connection with the administration of a Union Territory are contracts made in the exercise of the executive power of the Union;
>
> (*b*) all suits and proceedings in connection with the admininstration of a Union Territory shall be instituted by or against the Government of India."

Thus, it is clear that in a suit connected with the administration of a Union Territory like Pondichery, the party to be impleaded is the Government of India. But in this case, as we pointed out already, the first defendant is the Lt. Governor representing the State of Pondicherry and representing the President of the Republic of India. Even the learned counsel for the appellant had to admit that the Chief of Contributions Department, State of Pondicherry (the second defendant) and the Finance Secretary of the Government of Pondichery (third defendant) certainly were neither necessary nor proper parties to the suit because the appellant did not claim any relief against them and he was claiming relief only against the Government of Pondicherry.

9. Therefore, the only question that really has to be considered is whether the proper party has been impleaded when the appellant impleaded the Lt. Governor representing the State Pondicherry and representing the President of the Republic of India as the first defendant.

10. From what we have indicated above from the provisions of the Constitution and the Government of Union Territories Act, 1963, the proper party should have been the Government of India and certainly the Government of India had not been impleaded as a party to the suit. In view of the fact that the proper party against whom the appellant claimed relief had not been impleaded as a party to the suit, the suit could not have been proceeded with against the defendants who were actually impleaded to the suit. Hence, whatever may be the merits of the claim of the appellant herein, since the appellant could not claim any relief against the three defendants whom he had impleaded as parties to the suit, even if he had succeeded in establishing his case, the suit by the appellant was rightly dismissed though for different reasons. In view of this the appeal fails and is dismissed. But, there will be no order as to costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, C.J.* and *S. Mohan, J.*

Nellai Cotton Mills (P.) Ltd. ..*Petitioner**

v.

The Executive Officer, Office of the Town Panchayat, Thachanallur and another ..*Respondents.*

Tamil Nadu Public Health Act (III of 1939),—Constitution of India (1950), Seventh Schedule, List II, Entry 49—Levy of water-tax by Panchayat—Validity—Tax on land and building—Held valid.

The petitioner, a private limited Company, challenged the validity of the imposition of water-tax by a Town Panchayat and contended that it was a fee and as no service was rendered to the petitioner, the levy was premature. The petitioner also contended that if it was a tax, then it was not authorised by law.

Held: Water-tax was a tax, because the levy or imposition was *eo nominee* termed as 'tax' and not as 'fee'. [*Para.* 9.]

*W.P. No. 2078 of 1973, *10th November,* 1978.

Water-tax is always made relatable to land or building. The rate per cent. of such tax is reckoned with reference to the quantum of property tax on the land or building in question with a Panchayat, Municipality or Corporation. Though the expression water-tax was loosely adopted, as if it were a tax on water, in substance and in effect it was a tax on land and buildings and the owners of such lands and buildings. [*Para.* 13.]

Once a legal nexus between the tax imposed on the land or building on which water-works are undertaken is established, then such a connection between the land and the tax thereon in a given case gives the clue to judge whether it is a tax on land or building. Water tax which is inextricably connected with the land within the jurisdiction of the Panchayat, cannot be said to be so dissociated from such land or building. [*Para.* 15.]

When once a levy was authorised under the relevant provisions of both the Panchayats Act and the Public Health Act, it was not for the owner of the land and building to challenge it on the only ground that such water supply was not useful to him, having regard to the copious supply of water from his own well inside the mill campus. So long as a nexus is established between such water works or water supply undertaken by the Panchayat pursuant to its statutory obligations under the Act, and the land or building, and as long as it is in public interest and intended to serve the generality of the public, then the totality of the purpose and meaning of such levy has to be looked into for finding out whether it would come under Entry 49 of List II of the Seventh Schedule to the Constitution. The High Court had no hesitation to hold that such a tax was not only authorised, but was also a legal one and that the legislature had the requisite competence to impose such a tax in the exercise of their legislative power which was derived from Entry 49 as above. Section 25 of the Public Health Act and the ancillary provisions connected with it in the Public Health Act, and in turn incorporated in the Panchayats Act, were valid and they have been validly legislated upon. [*Para.* 17.]

Cases referred to:—

Municipal Commissioners v. *Parthasarathi*, I.L.R. (1888) 11 Mad. 341; *Municipal Council* v. *Prasadarayudu*, A.I.R 1936 Mad. 857; *Corporation of Madras* v. *Sundaram*, (1970) 2 M.L.J. 348: 83 L.W. 90; (*Morris*) *Leventhal* v. *David Jones Ltd.*, A.I.R. 1930 P.C. 129; *Nizam Sugar Factory* v. *Bodhan Municipality*, (1964) 2 An. W.R. 402: A.I.R. 1965 A.P. 91; *Municipal Council* v. *Narayana*, (1975) 2 S.C.C. 497: 1975 Tax. L.R. 2116: (1976) 1 S.C.J. 304: (1976) 1 M.L.J. (S.C.) 12: (1976) 1 S.C.R. 333: A.I.R. 1965 S.C. 2193; *Corporation of Calcutta* v. *Liberty Cinema*, (1965) 2 S.C.R. 477: A I.R. 1965 S C. 1107; *Anant Mills* v. *State of Gujarat*, 1975 Tax L.R. 1540: (1975) 2 S.C.C. 175: (1975) 3 S.C.R. 220: A.I.R. 1975 S.C. 1234.

Petition under Article 226 of the Constitution praying the High Court to issue a writ of *mandamus* forbearing the 1st respondent from leying or collecting any tax under section 25 of Tamil Nadu Public Health Act with respect to petitioner's property situate in Thachanallur Panchayat, Tirunelveli District.

V. Manivannan, for Petitioner.

Government Pleader, for Respondent.

The Order of the Court was made by

Ramaprasada Rao, CJ.—The writ petitioner is a company incorporated under the Indian Companies Act. It is a textile mill and a private limited company. For the year 1970-71, the petitioner paid Rs. 4, 318. 22 towards property tax, water tax and library cess to the Town Panchayat, Thachanallur, Tirunelveli district, which is the first respondent in the writ petition. For the year 1971-72, a general revision of the tax payable by the petitioner, among others, to the Panchayat was undertaken, and the tax was increased from Rs. 4, 318-22 to Rs. 5, 834-79. On representations made by the petitioner, a fresh assessment was made demanding a sum of Rs. 6,724-32, which comprised of property tax, water-tax and library cess, reckoned in the ratio of 1:0.50: 0. 50. On further representations, the tax was reduced to Rs. 6,081-38. *Inter alia* this amount represents a sum of Rs. 1,736.20 towards water tax. While this was the position, another notice of demand was issued on 28th October, 1972, whereby a sum of Rs. 7,059-68 towards all the three taxes was demanded. This included a sum of Rs. 2,942 towards water-tax. It is the admitted case that the tax on water has been increased from the ratio of 0.50 to 0.75. The increase, according to the Panchayat, was due to the water supply scheme undertaken by the Panchayat at a cost of Rs. seventeen lakhs which was under execution.

The petitioner again protested. In particular, the petitioner's case, so far as the increase in water tax was concerned, was that, since the Town Panchayat had at no time provided any water facility to the petitioner mills and as the water requirements of the entire mills was met from a big well inside the campus, there was no warrant for the levy of water tax at all. The petitioner has therefore come up to this Court for the issuance of a writ of *mandamus* as against the Panchayat restraining them from levying and collecting the sum of Rs. 2, 942, as water-tax under the relevant provisions of the Tamil Nadu Panchayats Act read with those under the Tamil Nadu Public Health Act.

2. The first contention of the petitioner is that, even assuming that such a levy is conceivable under the provisions of both the Acts, it is only in the nature of a fee for services to be rendered and that the levy is premature since no such service has been provided on the date when the impugned notice of demand was issued and that, in any event, the fee claimed cannot be said to be commensurate with the services which the Panchayat is likely to render to the petitioner mills.

3. Without prejudice to the above contentions, it is stated that, as a tax can be imposed only with the authority of law and as Entry 49 among other Entries, in List II of the Seventh Schedule to the Constitution of India does not enable the State Legislature to levy a tax on water or water supply by a Public Authority, such a levy is not authorised, and that, even assuming that the Acts referred to above enabled the first respondent to demand such a tax, such an imposition is beyond the legislative competence of the State Legislature.

4. It is also specifically alleged that section 25 of the Public Health Act violates the fundamental right of the petitioner under Articles 14 and 19 of the Constitution.

5. In the counter affidavit filed on behalf of the first respondent as well as the second respondent, which is the State of Tamil Nadu, represented by the Secretary to Government, R.D.L.A. department, the fact that the demand was made as stated in the affidavit is not denied. In so far as water tax is concerned, reference is made to the proposal to execute a water supply scheme at a total cost of Rs. 17,00,000, and it is stated that, in order to augment the resources of the Panchayat and for the proper execution and maintenance of such a water supply scheme, it became necessary to increase the rate of water tax from 50 per cent to 75 per cent. It is further stated that the Panchayat is authorised to levy water tax with the prior sanction of the Government and that such a sanction has been obtained. (It is not disputed in this case that the water tax levied was so authorised by the Government). It is also stated that the water supply being intended for the general welfare of the people within the Town Panchayat and as it is one of the obligations of the Town Panchayat to provide protected water supply, the petitioner cannot deny such a service voluntarily by himself on the foot that it has enough and copious supply of water from its own well. It is for the petitioner to seek service connection for water from the Panchayat, but on that ground it cannot deny its liability to pay water tax.

6. It will be convenient to refer to the relevant provisions of the Tamil Nadu Panchayats Act (XXXV of 1958) and the Tamil Nadu Public Health Act (III of 1939) for, the purpose of appreciating the relative contentions of the parties. Chapter III of the Panchayats Act deals with the functions and powers of the Panchayat. Section 63 (*g*) says that it is the duty of the Panchayat to make resonable provision for carrying out the requirements of the village or town in respect of the sinking and repairing of wells, the execution, repair and maintenance of ponds or tanks and the construction and maintenance of water works for the supply of water for washing and bathing purposes etc. Section 64 (*j*) of the Act deals with the power of the Panchayat to make such provisions as it thinks fit for carrying out the requirements of the village or town and *inter alia* refers to the construction of works of public utility and the provision of other facilities, for the safety, health, etc., of the inhabitants of the village or town. The Panchayats Act, as such, does not enumerate or enunciate as to what a water tax is, though sections 120, 121 and 122 refer to house tax, profession tax and vehicle tax.

7. The Tamil Nadu Public Health Act, 1939, which is applicable to the entire State, and which is admittedly applicable to the Town Panchayat in question, defines a local authority as well as an urban local authority. 'Local authority', as defined in section 3 (20) means,

in any area in a district as defined in the Madras Local Boards Act, 1920, which is comprised within the jurisdiction of a Panchayat (constituted under the Madras Village Panchayats Act, 1950), the Panchayat concerned. 'Urban local authority', as defined in section 3 (36) would include any Panchayat notified by the Government as an urban local authority for the purpose of the Act. Chapter III of the Public Health Act specifically deals with water supply. Section 17 authorises the local authority (in this case the first respondent) if the Government so directs, to provide or arrange for the provisions of a sufficient supply of drinking water for consumption by the inhabitants of the area within its jurisdiction. Such water supply, as far as practicable, should not only be adequate, but should also be continuous throughout the year besides being wholesome and fit for human consumption. Section 18 contemplates the local authority undertaking such water works, if so directed by the Government. In fact, section 18 (2) (*a*) enables the local authority with the sanction of the Government to construct water works for such supply of water, etc. Section 25, which is the charging section, reads as follows,—

> "25. (1) Any local authority may, with the previous sanction of the Government, and shall, if so directed by them, levy within its area or any part thereof any tax which may be necessary for providing water supply in such area or part;
>
> (2) Any tax levied under sub-section (1) may be a new tax levied on such basis assessed and realised in such manner as may be sanctioned or directed by the Government, or may be a tax or additional tax levied under any head of taxation specified in any law for the time being in force governing the local authority concerned in which case all the provisions of such law relating to the incidence, assessment or realisation of a tax under such head or in any manner connected therewith shall be applicable to the tax or additional tax with such modifications and restrictions, if any, as may be prescribed;
>
> (3) (*a*) The rates at which any tax may be levied under this section shall be determined by the local authority with the previous sanction of the Government in case the tax is levied by the local authority of its own motion and by the Government, in case the tax is levied at their discretion.
>
> (*b*) The local authority may, with the previous sanction of the Government, and shall, if so directed by them, alter the rates at which any such tax is to be levied.
>
> (4) (*a*) Every local authority levying a tax under this section shall earmark the net revenue therefrom for expenditure on the execution, maintenance and improvement of works of water supply in the local area or part thereof within which it is levied.
>
> (*b*) Such revenue shall be expended in accordance with such orders as may be issued by the Government in this behalf.
>
> (5) Nothing contained in this section shall be deemed to affect the power of the Corporation of Madras to levy a water and drainage tax under section 99 (1) (*b*) of the Madras City Municipal Act, 1919, or of any municipality governed by the Madras District Municipalities Act, 1920, to levy a water and drainage tax under section 81 (1) (*b*) of that Act or of any local board governed by the Madras Local Boards Act, 1920 to levy an additional house tax under rule 19 of Schedule IV to that Act for any purpose specified in that Rule.

This is the charging section which enables the local authority, with the sanction of the Government, to levy such water tax which may be necessary for providing water supply in the concerned area. Section 20 (6) says that, if a water tax is levied under section 25, the cost of carrying out the water works relatable to such area shall be borne by the local authority concerned.

8. The first challenge on the demand for water tax is on the ground that it is in the nature of a fee and not a tax. It is by now well-established that a fee is different from a tax. In the case of a fee an element of *quid pro quo* is always present, and the fee should reasonably be commensurate with the service rendered by the fee levying authority. If such a fee is *ex facie* disproportionate and arbitrary, then Courts will not hesitate to interfere and declare such a levy as an unauthorised one. Tax, however, connotes a totally different concept. It should be an imposition authorised by law and levied by the appropriate statutory authority. It takes into its fold all impositions made by the appropriate authority, when authorised by the appropriate legislature. It may be against

the person, privilege, occupation or enjoyment of the people, as the essential purpose of such imposition is to augment public revenue. The only test to find out whether a tax is legal or not is to see whether under the appropriate legislation, a provision for such a charging section has been made, and, if it is so found, then the imposition of such a tax slopes from the legislative competence of the State.

9. The contention of Mr. Manivannan, learned counsel for the petitioner, is that, as the Panchayats Act, by itself, does not provide for the imposition of water tax, the power said to be derivable by invoking section 25 of the Public Health Act which is a different Act, is neither reasonable nor plausible. As it is common to legislate by incorporation, the provisions of the Public Health Act, by reason of such incorporation have become inbuilt into the provisions of the Panchayats Act as well. We have already referred to the relevant provisions of the Public Health Act which enable the levy of water tax (section 25). It is not in dispute in this case that the Government has sanctioned the levy and that sanction was prompted because of the fact that water works of a substantial magnitude, costing about Rs. Seventeen lakhs, has been undertaken by the Panchayat, first respondent. The Public Health Act defines 'local authority' as including the Panchayat concerned, governed by the Tamil Nadu Village Panchayats Act. It, therefore, follows that the first respondent can impose water tax, notwithstanding the fact that no specific provision for the imposition of such tax has been expressly made, as is provided for in sections 99 to 102 of the Tamil Nadu City Municipal Corporation Act, 1919, or under section 81 of the Tamil Nadu District Municipalities Act. The question whether it is a fee or tax is thus answered by the fact that it is a tax, because the levy or imposition is *eo nomine* termed as 'tax' and not as 'fee'. As early as *Municipal Commissioners* v. *Parthasarathi*,[1] where a public levy was imposed, in similar circumstances, it was pointed out that the sole Judge was the local authority.

10. In *Municipal Council* v. *Prasadarayudu*[2], Varadachariar, J., observed:—

"Under what circumstances a water and drainage tax should be permitted to be levied in connection with works to come into existence in the future is a matter for the discretion of the Municipal body and of the Government and not a matter affecting the legality of the levy of the tax, if the Municipal body chose to levy the tax."

We are unable to accept that, in such circumstances, the impost should be treated as a fee. It is in public interests that water tax is levied.

11. In a Bench decision of this Court in *Corporation of Madras* v *Sundaram*[1], Veeraswami, CJ., forcibly expressed himself thus—

"It is well-settled principle that, where a public body is vested with a power or discretion, it is for exercise and not for inaction, and it is especially so, when the power or discretion has been vested for the benefit of those who will be affected by its non-exercise."

It was further observed that, merely because property tax is levied inclusive of water and drainage tax, though no facilities have been provided for, it cannot be regarded as illegal and no owner of property can, on that assumption, withhold any part of the tax as if it were attributable to water and drainage not provided for in the area in which the property is situate.

12. We are, therefore, unable to agree with the contention that the executory nature of the waterworks would not enable the Panchayat to demand the impost, provided it derives such authority to make the demand on the inhabitants within the Panchayat and so long as it has been sanctioned by the Government and if such waterworks are undertaken for the benefit of the inhabitants of the area

13. The Legislature was competent to provide for the imposition of such water-tax by virtue of the Entries in List II of the Seventh Schedule to the Constitution. We are here concerned with Entry 49 in List II which speaks of taxes on lands and buildings. On the language of the Entry, the contention of Mr. Manivannan is that provision of water is something which is independent of land and building and that, therefore, water-tax as such cannot be compartmentalised as if it were a tax on land and building. There is an

1. (1888) I.L.R. 11 Mad. 341.
2. A.I.R. 1936 Mad. 857.

1. (1970) 2 M.L.J. 348; 83 L.W. 99.

inherent fallacy in this contention. We have already seen that water-tax is always made relatable to land or building. In fact, the rate per cent. of water-tax is reckoned with reference to the quantum of propery tax on the land or building in question within the Panchayat, Municipality or Corporation. Though the expression "water-tax" is loosely adopted, as if it were a tax on water, in substance and in effect it is a tax on land and building and the owners of such lands and buildings.

14. In (*Morris*) *Leventhal* v. *David Jones Ltd.*[1] a bridge tax was upheld by the Privy Council, as a land tax, because the nexus between the tax and the land and building was so demonstrably appreciable. Even so, therefore when water-tax is imposed in order to subserve public interests and in exercise of a public duty or obligation, so as to subserve the needs of the inhabitants of the Panchayat, who own lands and buildings in that area; then also it cannot be disputed that it is not a tax on land and building. A Division Bench of the Andhra Pradesh High Court in *Nizam Sugar Factory* v. *Bodhan Municipality*[2], has squarely held that water-tax on land and building would come under Entry 49 in List II of the Seventh Schedule to the Constitution. We respectfully agree with the view of the learned Judge.

15. The subject-matter can also be considered from a slightly different perspective. In *Municipal Council, Madurai* v. *Narayanan*[3], Krishna Iyer, J. (speaking for the Court) in his inimitable style, observed—

"In *Liberty Cinema*[4], this Court had occasion to warn against reaching any conclusion, when there is a tax fee conflict, based on collocation of subjects in a statute or the placement of a provision under a certain rubric as clinching. What is telling is the totality, not some isolated indicium. A short cut is often a wrong cut and a fuller study of the statute to be construed cannot be avoided".

Once a legal nexus between the tax imposed on the land or building on which the water works are undertaken is established, then such a connection between the land and the tax thereon in a given case gives the clue to judge whether it is a tax on land or building. Undoubtedly, water-tax, which is inextricably connected with the land within the jurisdiction of the Panchayat, cannot be said to be so dissociated from such land or building.

16. In *Anant Mills* v. *State of Gujarat*,[1] where water pipes and electric cables were implanted underneath the land, and the objection was that, because of such interception, such land or property could not be taxed under Entry 49 of the State List, the Supreme Court observed:—

"Mr. Tarkunde on behalf of the petitioner-company has urged that under Entry 49 of the State List in the Seventh Schedule to the Constitution, the State Legislature is empowered to enact a law relating to taxes on lands and buildings. It is submitted that the State Legislature has no competence under the above Entry to enact a law for levying tax in respect of the area occupied by the underground supply lines. The word 'land' according to the learned counsel, denotes the surface of the land and not the underground strata. We are unable to accede to the above submission. Entry 49 of List II contemplates a levy of tax on lands and buildings or both as a unit. Such tax is directly imposed on lands and buildings and bears a definite relation to it. Section 129 makes provision for the levy of property tax on buildings and lands. Section 139 merely specifies the persons who would be primarily responsible for the payment of that tax. The word 'land' includes not only the surface of the earth but every thing under or over it, and has in its legal signification an indefinite extent upward and downward, giving rise to the maxim *cujus est solum ejus est usque ad coelum* (*See* pp 163—73 Corpus Juris Secundum). According to Broom's Legal Maxims, 10th Edn. p. 259. Not only has land in its legal signification an indefinite extent upwards, but in law it extends also downwards, so that whatever is in a direct line between the surface and the centre of the earth by the common law belongs to the owner of

1. A.I.R. 1930 P.C. 129.
2. (1964) 2 An. W.R. 402: A.I.R. 1965 A.P. 91.
3. (1975) 2 S.C.C. 497: 1975 Tax. L.R. 2116. (1976) 1 S.C.J. 304: (1976) 1 M L J. (S.C.) 12: (1976) 1 S.C.R. 333: A.I.R. 1975 S.C. 2193.
4. (1965) 2 S.C.R. 477: A.I.R. 1965 S.C. 1107.

1. (1975) Tax. L.R. 1540: (1975) 2 S.C.C. 175: (1975) 3 S.C.R. 220: A.I.R. 1975 S.C. 1234.

the surface (not merely the surface, but all the land down to the centre of the earth and upto the heavens) and hence the word 'land' which is *nomen generalissimum*, includes, not only the surface of the earth, but everything under it or over it".

17. Thus it is seen that when once a levy is authorised under the relevant provisions of both the Panchayats Act and the Public Health Act, it is not for the owner of the land and building to challenge it on the only ground that such water-supply is not useful to him, having regard to the copious supply of water from his own well inside the mill campus. So long as a nexus is established between such water-works or water supply undertaken by the Panchayat, pursuant to its statutory obligations under the Act, and the land or building, and as long as it is in public interest and intended to serve the generality of the public, then the totality of the purpose and meaning of such levy has to be looked into for finding out whether it would come under Entry 49 of List II of the Seventh Schedule. We have no hesitation to hold that such a tax is not only authorised, but is also a legal one and that the Legislature had the requisite competence to impose such a tax in the exercise of their legislative power which is derived from Entry 49 as above. We, therefore, hold that section 25 of the Public Health Act and the ancillary provisions connected with it in the Public Health Act, and in turn incorporated in the Panchayats Act, are valid and that they have been validly legislated upon.

18. For the reasons stated above, we are unable to issue a writ of *mandamus* as asked for by the petitioner, as a writ of *mandamus* is a high prerogative, writ, which is not granted for the mere asking of it. The hypothesis and the basic requirements for the issue of such a writ are that a public body is refusing to do its public duty or it is acting in excess of its authority or is openly violating the principles of natural justice. From the records, it should be apparent that the aggrieved party has a legal right to compel or enforce the performance of a correlative duty on the part of the public body. Such a right or duty need not always slope from the provisions of the Constitution, but may be founded on statute or law. Courts will be reluctant to issue the prerogative writ of *mandamus* unless the legal right of the petitioner and the legal duty of the respondent are of a public nature. We have already seen that the petitioner has no such legal right to compel the first respondent not to make a demand on him for water tax. Such a right to impose a levy is not only authorised under the relevant statute, as already referred to but is also a legal duty on the part of the first respondent to make such a demand, that being in public interest to do so.

19. The writ petition, therefore, fails and is dismissed with costs. Counsel's fee Rs. 250.

S. J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— *T. Ramaprasada Rao, C.J.*

K. PL. S. PL. Firm, Colombo by its Partner K. PL. S. PL. Subramanian Chettiar .. *Petitioner**

v.

RM. P. MR. M. Subramania Chettiar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 10—Impleading parties —Suit by firms against four persons—Defence of all partners of the firm not being brought on record or their names disclosed—Suit dismissed—Appeal by plaintiff —Application filed to implead all the partners as parties—Application, whether can be allowed.

A suit was filed by a firm purporting to be a partnership firm against four persons. The dispute was that all the partners constituting the plaintiff partnership-firm were not brought on record or their names disclosed. The suit was dismissed and an appeal against the dismissal was preferred by the plaintiff-firm as it stood on record. In the course of the hearing of the appeal, an application was taken out by the firm under Order 1, rule 10, Civil Procedure Code, seeking to implead the other partners as formal respondents to the appeal in order to overcome the technical difficulty which arose in the course of the trial. The application was rejected by the lower Court on the ground that it was belated. Against this order the present revision was filed.

Held : It was at the appellate stage the plaintiff filed an application to fill up the lacuna. For that purpose he took out an application under Order 1, rule 10, Civil Procedure Code, for impleading the legal representatives of the other partners who by then had died and did not even seek any relief as against the proposed parties. The attempt was made in order to complete the record and to obviate any technical objection at the appellate stage. The proposed parties could not oppose, in the circumstances of the case, any claim for relief asked for by the plaintiff, because they were sailing along with the others. In fact, they were set as *ex parte* in the Court below and they did not appear in the High Court. Obviously they had left everything to the only partner who was representing the firm and who was continuing the legal proceedings. In the absence of any fresh pleading, which is possible only by the proposed parties, it was difficult to see as to what prejudice would be caused to the contesting defendants by the proposed parties being brought on record. As it would neither prejudice the contesting defendants nor would put them to any inconvenience as it may not be necessary for them to file an additional written statement the surmise made by the District Judge appeared to be not justified in the instant case. The appellate Court ought to have allowed the application. The lower appellate Court was directed to implead the proposed parties as formal respondents to the appeal and proceed with the appeal in the manner known to law as if all the proper parties were before it. [*Para.* 2.]

Case referred to: —

Purushottam Umedbhai and Co. v. *Manilal and Sons*, (1961) 1 M.L.J. 283.

Petition under section 115 of Act (V of 1908) praying the High Court to revise the Order of the District Court, Ramanathapuram at Madurai on 6th September, 1976 and made in I.A. No. 183 of 1976 in A. S. No. 29 of 1976.

S. V. Jayaraman, for Petitioner.

The Court made the following

ORDER.—A suit was filed by a firm purporting to be a partnership firm against four defendants. The defence was that all the partners who constituted the plaintiff partnership firm were not brought on record or their names disclosed. Learned counsel for petitioner says that beyond this, the contesting defendants did not seek for a disclosure of the names of all the partners who constituted the partnership firm. Be that as it may, the suit went on and it is conceded that the suit has been dismissed and an appeal as against the dismissal was preferred by the plaintiff-firm as it was on record. It appears that the trial Court also went into the question about the maintainability of the suit by a partnership firm without fully disclosing the names of its other partners. The trial Court dismissed the suit also on the ground that such a suit without disclosing the names

* C.R.P. No. 3667 of 1976. *21st June, 1979.*

of all the partners was not maintainable. Being aggrieved by both findings of the trial Court, the petitioner-firm, as already stated, filed, an appeal in the usual course, A.S. No. 29 of 1976, on the file of the District Judge, Ramanathapuram. In the course of the hearing of such an appeal, an application was taken out by the firm as on record under Order 1, rule 10, Civil Procedure Code, seeking to implead the other partners as formal respondents to the appeal in order to overcome the technical difficulty which arose in the course of trial. The proposed respondents, who were the legal representatives of the deceased partner of the firm, remained *ex parte*. This shows that they were not opposing the move of the partnership firm as initiated by one of its partners. The contesting defendants-respondents, however took up the plea that the application was a belated one and it ought not to be entertained. This found favour with the District Judge, Ramanathapuram. He was of the view that the plaintiff-firm was indifferent in not having taken out such an application earlier and particularly during the trial stage and he was also of the view that by impleading formally, the legal representatives of the other partner, who by then died, it would necessitate the filing of an additional written statement besides working hardship on the contesting defendants. On these grounds, the application was rejected. It is as against this, the present civil revision petition has been filed.

2. It may not be necessary in this case to go into the question as to what would be the effect of a defectively instituted suit by a firm by or some of its partners without disclosing the names of all its partners. The answer to this technical flaw or infirmity in the pleadings is found in Order 30, rule 2, sub-rule (2) of the Civil Procedure Code. This sub-rule enjoins the trial Court to stay such an imperfectly alleged pleading and proceed with the suit as soon as the names of all partners are declared as provided for in Order 30, rule 2 (1). These provisions have been therefore, characterised by the Supreme Court in *Purushottam Umedbhai and Company* v. *Manilal and Sons*,[1] as enabling provisions. The word adverted to being "enabling", it appears to me that the non-conformity with the intendment and prescription in Order 2, rule 2 is not fatal to the action already instituted by a partnership firm without disclosing the names of all its partners. The only result of such imperfection would be to stay the suit until there is a total disclosure of the names of all the partners. The question in the instant case, however, is slightly different. There has not been a demand as was required under Order 30, rule 2 (1) of the Civil Procedure Code, by the contesting defendants, whereby the plaintiffs were called upon to declare in writing the names and the place of residence of all the persons constituting the firm on whose behalf the suit is instituted. On the other hand, however, Mr. Jayaraman says that the defence of the contesting defendants was to the effect that the suit has not been properly framed. For reasons not very clear, the parties went to trial with such imperfect pleading. But the trial Court, without staying the suit as required under Order 30, rule 2 (1) adjudicated the subject-matter and was of the view that the suit was not maintainable. It also went into the merits of the case and found against the plaintiff. A substantial appeal has been filed as against such findings of the trial Court. It was at the appellate stage that the plaintiff wanted to fill up the lacuna. For that purpose he took out an application under Order 1, rule 10, Civil Procedure Code, for impleading the legal representatives of the other partner, who by then died, and did not even seek any relief as against the proposed parties. Such an attempt was made in order to complete the record and to obviate any technical objection at the appellate stage. The proposed parties could not oppose, as in the circumstances of the case, any claim or relief asked for by the plaintiff because they were sailing along with them. In fact, they were set *ex parte* in the Court below and they did not appear before me. Obviously they have left everything to the only partner who is representing the firm and who is continuing the legal proceeding. In the absence of any fresh pleading, which is possible only by the proposed parties, I am unable to understand as to what prejudice would be caused to the contesting defendants by the proposed parties being brought on record. As it would neither prejudice the contesting defendants nor would it put them to any inconvenience as it may not be necessary for them to file

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1. (1961) 1 M.L.J. 283.

an additional written statement, the surmise made by the District Judge appears to be not justified in the instant case. The appellate Court ought to have allowed the application. The order of the Court below is, therefore, set aside. The lower appellate Court is directed to implead the proposed parties as formal respondents to the appeal and proceed with the appeal in a manner known to law as if all the proper parties are there before it. There will be no order as to costs.

R.S. *Civil revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ratnam, J.*

P. Ramamoorthy and another .. *Petitioners**

v.

N.R. Pattari Chettiar .. *Respondent*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXII of 1973), section 10 (3) (c) (d)—Scope and applicability—Lease of non-residential building—Landlord requiring building for additional accommodation for the purpose of carrying on jewellery business—Hardship likely to be caused to petitioner by ordering eviction if would outweigh the advantage to landlord.

The premises in the occupation of the petitioner was a portion of a building on the western side of the entire building which belonged to the respondent. The petitioner took a lease of the premises for a period of three years for the purpose of running a coffee hotel. The lease was entered into by the first respondent and on behalf of his brother the second petitioner, and the rent fixed was Rs. 4,500 per annum and the period of tenancy was three years. The second petitioner was conducting a hotel business and the first petitioner would occasionally visit and check the accounts. On the eastern portion of the entire building belonging to the respondent, the respondent was having a javuli business and a jewellery business. Finding it difficult and inconvenient to run both the businesses within that area, the respondent wanted the premises in the occupation of the petitioners as additional accommodation in order to conduct his jewellery business separately in a more convenient manner. In addition, the respondent also stated that there was an intended partition and transfer of jewellery business to his four sons and the jewellery business had therefore to be kept separate from the javuli business. The petition for eviction was opposed by the tenants on several grounds and essentially on the ground that the hardship resulting to them by ordering eviction would outweigh the advantage to the landlord and therefore the eviction should not be ordered. The learned Rent Controller ordered eviction holding that he was not satisfied that the hardship caused to the petitioners would outweigh the advantage to the landlord. The Appellate Authority also confirmed the order of eviction. The tenant there upon filed a petition to revise the order of eviction.

Held, that the Supreme Court in *Mst. Bega Begum and others* v. *Abdul Ahad Khan (dead) by legal representatives and others*, (1979) 1 S.C.C. 273 : A.I.R. 1979 S.C. 272, had pointed out that in deciding the aspect of relative hardship each party has to prove the relative advantages or disadvantages and that the entire onus cannot be thrown on the landlord to prove that lesser disadvantages will be suffered by the tenants and that they were remediable. The considerations to be taken into account in assessing the relative hardship were also set out and in particular it was pointed out that the inability to get similar accommodation anywhere in the city would be a weighty consideration, but that to insist on getting alternative accommodation of a similar nature in the same locality will be asking for the impossible. Applying these tests, it was clear in the instant case that very close to the premises in the occupation of the petitioners, other buildings were available but the petitioners had not made any attempts whatever to secure them and having failed to do so, they cannot certainly be heard to complain that they are under a disadvantage by reason of the eviction order against them which will outweigh the advantage to the landlord, and therefore the application for eviction should be rejected. As the requirement of the premises in the occupation of the petitioners by the respondent as additional accommodation had been admitted by the petitioners, they cannot resist an order for eviction being made against them on the ground of relative hardship. A consideration of the circumstances as revealed by

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*C.R.P. No. 1068 of 1979. 24th July, 1979.

the evidence discloses that the tenants will not suffer any disadvantage at all by an order of eviction being passed against them since they can always shift their business to similar accommodation which was available in the locality and the securing of other accommodation cannot be considered to be hardship that would outweigh the advantage to the landlord by an order for eviction in his favour. The view taken by the Appellate Authority is, therefore, perfectly correct and does not call for any interference in revision. [*Para.* 11.]

Case referred to :—

Mst. Bega Begum and others v. *Abdul Ahad Khan*, (1979) 1 S.C.C. 273 : A.I.R. 1979 S.C. 272.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as amended by Tamil Nadu Act XXIII of 1973 praying the High Court to revise the order of the Court of the Subordinate Judge, Dindigul, dated 11th April, 1979 and made in C.M.A. No. 67 of 1977 (H.R.C.O.P. No. 34 of 1976 on the file of the Court of the Rent Controller and District Munsif, Periakulam).

K. Chandrasekharan, E. Padmanabhan and *G. Ethirajulu*, for Petitioners.

N.S. Varadachari and *C.P. Pattabhiraman*, for Respondent.

The Court delivered the following

JUDGMENT.—The tenants, who had lost in the Courts below, are the petitioners in this civil revision petition which arises out of an application filed by the respondent herein for eviction of the petitioners from the premises in their occupation under section 10 (3) (c) and (d) of the Tamil Nadu Buildings (Lease and Rent Control) Act, XVIII of 1960 as amended by Act XXIII of 1973.

2. The premises in the occupation of the petitioners bearing old door No. 9-1-108 and new door No. 16 is a portion of building on the western side of the entire building which belongs to the respondent. On 14th May, 1973, the petitioners took a lease of that premises for a period of 3 years for the purpose of running a coffee hotel. The lease had been entered into by the first respondent and on behalf of his brother, the second petitioner, and the rent fixed was Rs. 4,500 per annum and the period of tenancy was three years. The second petitioner is conducting the hotel business and the first petitioner occasionally visits and checks the accounts. On the eastern portion of the entire building belonging to the respondent, the respondent is having a javuli business under the name and style of "Jupiter Javuli Hall" as well as a jewellery business under the name of "Thayalu Jewellery Mart". Finding it difficult and inconvenient to run both the businesses within an area of 17'×12' the respondent wanted the premises in the occupation of the petitioners as additional accommodation in order to conduct the jewellery business and the javuli business separately in a more convenient manner. In addition, the respondent also claimed that there was an intended partition and transfer of jewellery business to his four sons and the jewellery business had therefore to be kept separately from the javuli business. In May, 1976, the respondent informed the petitioner that the premises occupied by them is required by him as additional accommodation and that they should vacate after the expiry of the lease on 14th May, 1976, but apart from a mere promise to do so, the petitioners continued to remain in occupation. Thereafter, the respondent issued a notice on 14th July, 1976, for which a reply was sent by the petitioners admitting the tenancy as well as the quantum of rent, but stating that the respondent was demanding enhanced rent and therefore the demand for vacating the premises was made. The respondent averred that he did not want to let out the building to any third party and that he was even prepared to give an undertaking to that effect, but wanted the premises only for the purpose of separately carrying on the jewellery business from the javuli business. Inasmuch as the petitioners did not surrender possession of the premises in response to the notice issued by the respondent, he filed R.C.O.P. No. 34 of 1976 under section 10 (3) (c) and (d) praying for an order for eviction.

3. The petitioners resisted that application contending that there is no contractual tenancy but that they were only statutory tenants. They claimed that they have been running the hotel business as tenants from 14th May, 1964, and periodically there has been an enhancement of rent. While admitting that the rent was fixed at Rs 4,500 from 14th August, 1973, the petitioners claimed that the respondent wanted enhancement of

the rent to Rs. 6,000 per annum from 15th May, 1976, and therefore, the petitioner tendered the amount, but it was refused by the respondent. An attempt by the petitioners to send that amount by bank draft also failed, but, in the meanwhile, the respondent had caused a notice to be sent on 14th July, 1976, which according to the petitioners, discloses the *mala fide* character of the respondents. Owing to the refusal of the respondent to receive the rent, the petitioners had to file R.C.O.P.No. 33 of 1976 under section 8 (5) of the Tamil Nadu Buildings (Lease and Rent Control) Act for deposit of the rent. According to the petitioners, the javuli and jewellery businesses are being done in the same premises for several years and even before the petitioners came into possession of the premises in question, it was so. It was further averred by the petitioners that the respondent had three more buildings on the east let to other persons all of which were situate in a very important locality whereas the building in the occupation of the petitioners is behind the building in which the jewellery business is done with an independent access on the western side. The requirement of the respondent on the ground of additional accommodation was denied. The petitioners stated that both the businesses could be run in the same premises by the respondent as was being done for the last 20 years. In the hotel business run by the petitioners, it was claimed that there was quite a number of employees subject to the provisions of the Shops and Establishments Act and it was not possible to get a similar building or any building for that matter in the locality to run a hotel business. It was therefore the case of the petitioners that the hardship resulting to them by ordering eviction would outweigh the advantage to the landlord and therefore, eviction should not be ordered.

4. The petitioners, as stated above, had also filed R.C.O.P.No. 33 of 1976 under section 8 (5) for depositing the rent. In the counter filed by the respondent, the case of the petitioners that there was a demand for enhanced rent was denied. It was further stated that since there is no renewal of tenancy after 14th May, 1976, the petitioners are persons holding over and therefore, not entitled to deposit any rent and that too for an aggregate period of one year. Both the applications R.C.O.P. No. 34 of 1976 filed by the respondent herein for eviction and the deposit application filed by the petitioners herein in R.C.O.P. No. 33 of 1976 were heard together and evidence was recorded in R.C.O.P. No. 34 of 1976. In dealing with the requirement of the respondent of the premises in the occupation of the petitioners by way of additional accommodation; the learned Rent Controller held that the respondent *bona fide* required the building as additional accommodation for jewellery business. The learned Rent Controller further found that he was not satisfied that the hardship caused to the petitioners should outweigh the advantage to the landlord. On these findings R.C.O.P. No. 34 of 1976 was allowed directing the petitioners to vacate the premises and R.C.O.P. No. 33 of 1976 was dismissed. Aggrieved by that, the petitioners herein preferred C.M.A. No. 67 of 1977 against the order of eviction and the first petitioner preferred an appeal in C.M.A. No. 83 of 1973 against the dismissal of R.C.O.P. No. 33 of 1976. The appellate authority (Sub-Judge, Dindigul) held that the requirement of the respondent of the premises in the occupation of the petitioners as additional accommodation is *bona fide* and that the petitioners are liable to be evicted. On the question of relative hardship, the appellate authority referred to the finding of the Rent Controller that the hardship caused to the tenant would not outweigh the advantage to the landlord, though he did not record any separate finding on this aspect. However, ultimately, the order of eviction was confirmed and that C.M.A. was dismissed. Thereafter, the petitioners preferred C.R.P.No. 2495 of 1978 against the order of eviction confirmed in C.M.A. No. 67 of 1977. While disposing of that civil revision petition, Sathiadev, J., stated that there is a duty on the part of the appellate authority to consider and ascertain the relative hardship and advantage as per the proviso to section 10 (3) (*c*) of the Act and inasmuch as the appellate authority had not adverted to this vital aspect, it must be considered by the appellate authority and for this purpose, the matter was remitted giving liberty to the parties to adduce fresh evidence limited to this aspect. After the remit order, the appellate authority has found that the hardship likely to be caused to the peti-

tioners will not outweigh the advantage to the respondent and had confirmed the order of eviction. It is this order that is sought to be revised by the tenants in this civil revision petition.

5. After the remit order the petitioners examined R.Ws. 2 to 5 and the son of the respondent examined as P.W.1 was recalled and examined in addition to the marking of Exhibits A-3 to A-6 and B-3 to B-51.

6. It must be mentioned that when the matter was remitted back to the appellate authority (Sub Judge, Dindigul) the fact that the respondent landlord required the premises in the occupation of the petitioner as additional accommodation was not disputed by the petitioners. Indeed, the appellate authority has recorded this in paragraph 8 of its judgment. The only question that arises for consideration in this civil revision petition is whether the hardship that may be caused to the petitioners by ordering eviction will outweigh the advantage to the landlord-respondent.

7. It is true that the premises in the occupation of the petitioners is situate just opposite to the bus stand at Theni and the petitioners have been running the hotel business for several years past. It is claimed by the petitioners that there are seven permanent workers and seven temporary workers and that they have invested Rs. 18,000 in the business. It is also their case that in the event of there being an order of eviction against them, they would be virtually obliged to close down the business because it is not possible to secure similar accommodation or other accommodation as convenient as the present premises. In addition, the further plea of the petitioner is that there is a likelihood of the workers being retrenched in the event of there being an order of eviction against the petitioners and compensation at the rate of Rs.2,000 per worker will have to be paid. According to the petitioner compared to the hardship that they are likely to suffer as a result of an order of eviction against them, the respondent might, as well, continue to conduct the cloth and jewellery business in the same premises, where such business had been carried on for the last 18 years.

8. The first petitioner is not running the business in the premises in question since, admittedly, he is running another hotel in Thanjavur. The earliest of the ledgers produced by the petitioners Exhibit R 4 relating to the period 1968-69 shows that the petitioners had invested only a sum of Rs. 3,706.04 and in Exhibit B-14 which is ledger for the period 1st April, 1973 to 31st March, 1974, this had been carried over from the previous ledgers and shown as Rs. 3,835. There has been an addition of a second-hand grinding machine for Rs. 1,300 on 23rd February, 1974, and a sum of Rs. 200 had been spent towards fitting and other incidental charges. Therefore, even as per the accounts relied on by the petitioners, the total amount invested comes to Rs. 5,335 and not Rs. 18,000 as R.W. 2 would have it. The ledger produced in respect of 1966-67 *viz.*, Exhibit B-20 did not contain any entry with regard to the furniture vessel etc. with reference to the capital contribution, R.W. 2 would state that at the inception there were four partners each of whom had contributed Rs. 4,000 to Rs. 4,500 but there are no account books to substantiate this. The first petitioner has contributed only Rs. 950.56 as disclosed by the entries in Exhibit R.4. The profit and loss account is maintained in the last page of the ledgers except in Exhibit B-6 and a few of these pages had been cut and removed and this establishes that the accounts produced are not totally acceptable. It is also seen from the accounts that the business of the petitioners had been running at a loss except during the years 1970-71 and 1971-72 when a negligible profit of Rs. 645.52 and Rs. 332.59 is shown. From 1972-73 till 1976-77, the business had been running at a loss. The investment of moneys in the business and the capital contribution as spoken to by R. Ws. 1 and 2 on behalf of the petitioners are certainly exaggerated and not made out by the accounts. From the register of wages Exhibit B-43, it is found that there are only 7 permanent employees and the pay of each one of these permanent employees ranges from 52.50 to Rs. 90 p.m. There is no proof with reference to the employment of seven temporary employees. The petitioners claimed that even if seven permanent employees have to be thrown out of employment as a result of the order of eviction, they will be obliged to pay a compensation of Rs. 15,000 and therefore this would result in great hardship. The question of retrenchment does not arise if the petitioners are able to shift their business to some other premises in which

the same employees could be engaged and all that the petitioners have to do is to secure another suitable premises for their business. P.W. 1 is definite that three buildings *viz.*, door No. 39 at Madurai Road belonging to one Krishnamoorty Raja measuring 60′ x 30′, another building bearing door No. 648 measuring 80′ x 25′ belonging to Thanga Pandian, and the third building bearing door No. 600 belonging to Arya Vysya Sangam, measuring 70′ x 40′ were all lying vacant, where a hotel could be conducted, but that the petitioners had not made any sincere attempt to secure alternative accommodation for the running of their hotel business. Indeed R.Ws. 2, 4 and 5 had also admitted that the building belonging to Arya Vysya Sangam was lying vacant and that it had been occupied only recently. R.W. 3 is definite that the building belonging to Krishnamoorthy Raja measuring 60′ x 38′ is close to the petition premises and was also lying vacant. From the foregoing discussion of the evidence it is clear that similar suitable accommodation for the purpose of running a hotel was available in the vicinity; but that the petitioners did not make any attempt whatever to secure for themselves such accommodation. The unwillingness of the petitioners to secure available alternative accommodation cannot be equated to such hardship to the tenants which will outweigh the advantage to the landlord within the meaning of proviso to section 10 (3) (c) so as to disentitle the respondent from asking for an order of eviction.

8. Exhibit A-4 which is a blue print of the shop in question shows that the building is 61′. 3′ x 23′ in which the cloth shop and the jewellery shop are situate on the eastern side within an area of 17′ x 12′ and the western portion is in the occupation of the petitioners. The respondent and his four sons have also entered into a partnership deed dated 12th December, 1968 for running a jewellery mart and a cloth shop. A perusal of Exhibit A-5, the Sales Tax Assessment order for the year 1977-78 shows that the turnover is nearly Rs. 2 lakhs. The son of the respondent had given evidence as P.W. 1 that the existing space of 17′ x 12′ for the carrying on of the cloth shop and the jewellery shop is inadequate and inconvenient and that they require the premises under the occupation of the petitioner for accommodating the jewellery business. Indeed, under Exhibit A-6 dated 17th January, 1979, the Inspector of Central Excise, Theni, had issued a notice directing the shifting of the cloth shop from the premises where jewellery business is being carried on as the place is an approved premises for conducting gold dealers business. This is also pressed into service by the respondent for securing possession of the premises in the occupation of the petitioners. From the evidence available it is clear that the business of the respondent in cloth and jewellery in a space of 17′ x 12′ cannot be carried on, especially in view of the notice from the Inspector of Central Excise that the cloth business should be shifted. It therefore becomes necessary for the respondent in order to continue to run his jewellery business in the approved premises, that the other business should be shifted from the existing place as required in the notice. The accommodation of 17′ x 12′ is hardly sufficient to accommodate both the businesses having regard to the turnover. The first petitioner is away in Thanjavur and no hardship would be caused to him by an order of eviction against him. Having regard to the investment that has been made by the petitioners in the business and the availability of alternative accommodation in the locality, it cannot certainly be said that the hardship to the petitioner by an order for eviction being made against them, will outweigh the advantage to the landlord in the instant case.

9. The learned counsel for the respondent invited my attention to the decision in *Shivaji Rao* v. *Bhujanga Rao*[1]. Dealing with the situation similar to the one in the present case that if an order of eviction is passed, the tenants will go out of business, N.S. Ramaswami, J., observed thus :—

> "Even assuming that some of the tenants are carrying on business in bullion, they need not necessarily go out of business if they are evicted from the present shop. It is not an impossibility for them to get alternative accommodation in the same locality. In any event, the evidence on record does not disclose that no other similar accommodation would be available in the same locality. The appellate authority has pointed out that from the admission of the tenants in the witness box it appeared that they had not made any attempt to find alternative accommodation. The mere

1. C.R.P. No. 3131 of 1973.

fact that the tenants might have to pay higher rent for the alternative accommodation then what they are now paying to the present landlord for the shops in question or that they may be forced to pay what is called *pagadi* for getting such alternative accommodation is not such hardship which would outweigh the advantage to the landlord as contemplated under the above proviso."

10. These observations are apposite and are applicable to the instant case.

11. The learned counsel for the respondent invited my attention to the judgment of the Supreme Court reported in *Mst. Bega Begum and others* v. *Abdul Ahad Khan (dead) by L.Rs. and others*[1]. The Supreme Court has pointed out that in deciding the aspect of relative hardship, each party has to prove the relative advantages or disadvantages and that the entire onus cannot be thrown on the landlord to prove that lesser disadvantages will be suffered by the tenants and that they were remediable. The considerations to be taken into account in assessing to relative hardship have also been set out and in particular it has been pointed out that the inability to get similar accommodation anywhere in the city would be weighty consideration, but that to insist on getting alternative accommodation of a similar nature in the same locality will be asking for the impossible. Applying these tests, it is clear in the instant case that very close to the premises in the occupation of the petitioners, other buildings are available; but that the petitioners had not made any attempts whatever to secure them and having failed to do so, they cannot certainly be heard to complain that they are under a disadvantage by reason of the eviction order against them which will outweigh the advantage to the landlord and therefore, the application for eviction should be rejected. As the requirement of the premises in the occupation of the petitioners by the respondent as additional accommodation has been admitted by the petitioners, they cannot resist an order for eviction being made against them on the ground of relative hardship. A consideration of the circumstances as revealed by the evidence discloses that the tenants will not suffer any disadvantage at all by an order of eviction being passed against them since they can always shift their business to similar accommodation which is available in the locality and the securing of other accommodation cannot be considered to be a hardship that would outweigh the advantage to the landlord by an order for eviction in his favour. The view taken by the appellate authority is, therefore, perfectly correct and does not call for any interference in revision. The civil revision petition therefore fails and is dismissed with costs.

12. Learned counsel for the petitioners prays for time to vacate the premises and the learned counsel for the respondent has no objection to grant two months' time to vacate the premises. The petitioners are accordingly granted two months' time from today (24-7-1979) to vacate the premises.

R.S. —— *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

D. S. Vasu and another .. *Appellants**

v.

Ethiraj (Minor represented by Kannammal, mother and next friend)

.. *Respondent.*

Legal Representatives' Suits Act (XII of 1855), section 1—Actio personalis moritur cum persona — *Maxim — Provision to the contrary made in the statute—Maxim has no application—Suits can be filed against heirs also.*

The maxim *actio personalis moritur cum persona* has no application where provision to the contrary has been made by the statute in Legal Representatives' Suits Act (XII of 1855).

While the first part of section 1 does not contemplate heirs commencing proceedings, the second part provides for suits being instituted against, amongst others, the heirs. This clearly goes to confirm the view that

1. (1979) 1 S.C.C. 273: A.I.R. 1979 S.C. 272.

*A.S. No. 296 of 1973. 3rd October, 1977.

the suit was liable to be filed against heirs also. The maxim above referred to has no application here. [*Para.* 10.]

Cases referred to:—

Rustomji Dorabji v. *W. H. Nurse*, I.L.R. (1921) 44 Mad. 357: 14 L.W. 200: 40 M. L.J. 173: A.I.R. 1921 Mad. 1; *Deeba* v. *Babaia*, A.I.R. 1927 Nag. 337; *Philips* v. *Hemfrey*, (1883) 24 Ch.D. 430.

Appeal against the decree of the City Civil Court (II Assistant Judge), Madras, dated 9th November, 1972 and passed in C.S. No. 2166 of 1970.

N. Sivamani and *N. Krishna Mitra*, for Appellant.

P. K. Gopal Raj and *A. J. A. Kumaran*, for Respondent.

The Court delivered the following

JUDGMENT.—The defendants in O. S. No. 2166 of 1970 in the City Civil Court, are the appellants. The plaintiff, a minor went to the flour mill belonging to one Nagammal, the mother of the defendants, on 12th August, 1968 at about 3 P.M. for polishing rice. According to the plaintiff, the servant employed in the mill received the rice and directed him to hold the bag under the huller to receive the polished rice and as he was holding the bag, the motor was switched on and the iron blade from the machine flew out and cut off his right arm below the elbow with the result that he fell down and sustained certain injuries apart from losing his right arm. The plaintiff therefore filed the present suit for recovery of damages of Rs. 15,000. As the said Nagammal had died by the time the suit came to be filed, he impleaded the children of the said Nagammal as defendants.

2. In the written statement filed by the defendants it was contended that the suit instituted on behalf of the minor plaintiff by his mother as his guardian was not proper as the father was alive, that the suit was not maintainable against the defendants and that there was no negligence on the part of the said Nagammal so as to give rise to any claim for damages by the plaintiff. It was also contended that there was no request made to the plaintiff by any servant in the rice mill to hold the bag under the huller.

3. The learned Second Assistant Judge framed six issues and came to the conclusion that the plaintiff was entitled to damages. He held, however, that the damages could only be Rs. 10,000 and decreed the suit accordingly. The defendants have come forward with the present appeal challenging the decree of the Court below.

4. The learned counsel for the appellants contended that there was no liability for damages at all in this case, that in any event the liability was personal to Nagammal so that the defendants could not be proceeded against and that the quantum of damages was fixed in an arbitrary manner. Thus, three points arise out of these contentions, *viz.*, (1) was there any liability to pay damages in the present case; (2) was the liability personal to Nagammal; and (3) whether the quantum of damages as fixed by the Court below, namely, Rs. 10,000 was properly fixed?

5. On the first point, the plaintiff himself has given evidence. He has stated the circumstances under which he went near the huller and he has also described the way in which the blade fell on him and cut his right arm. D.W. 1 is the first defendant. He stated that the customers are not entitled to go inside the enclosed portion where there was a board with the caption "Danger". He was himself employed in the Easun Engineering Company as Sales Manager and he has admitted that he would be in office till about 5.00 P.M. He did not also witness the accident in question. His evidence is not therefore of any consequence as regards the points which arise for consideration here. D.W. 2 is the driver of the flour mill. He did not know how the accident occurred and he admitted that he was at the back portion and he came to know about the accident only after it happened. His evidence also cannot therefore be of any significance with reference to the points that arise before me. Thus, there is the uncontradicted evidence of P.W. 1 that he went to the rice mill on a particular day, that he was asked to hold the bag for collecting the flour and that he was injured at that time by the blade flying out of the machine. In these circumstances, it is clear that the accident happened when the blade escaped immediately the motor was

started. The negligence on the facts is proved as, if the machinery had been properly maintained or tested, the blade would not have escaped from the machinery. The liability to damages is established from the evidence before me.

6. The next question is whether the defendants are liable for the damages. As mentioned already, the accident occurred at a time when Nagammal was alive. The defendants have inherited the mill from the said Nagammal on her death. The point to be considered is whether with the death of Nagammal the liability to damages disappears.

7. The maxim relied on in this connection by the appellant's counsel is *actio personalis moritur cum persona* which means a personal action dies with the person. This maxim, as text books on Torts state, was originally introduced to prevent action of a penal character like trespass and its offshoots being brought after the death of the wrongdoer against his representatives. Later on, the general language of the maxim came to be applied, perhaps misapplied, to cases of death of injured persons though to such cases the reason of the rule has no strict application. Even in Britain, where this rule was applied in the cases of liability under Torts, the Law Reform, (Miscellaneous Provisions) Act, 1934 ruled out the application of this maxim in several cases. Pollock on Torts refers to this rule as barbarous. It was pointed out by Lord Wright in 53 Law Quarterly Review 160, that the worst part of these maxims is that they are so difficult to get rid of. How far this maxim can be applied in India came for consideration before a Full Bench of this Court in *Rustomji Dorabji* v. *W. H. Nurse and another*[1]. In that case, Rajagopala and Nurse gave a criminal complaint against Rustomji alleging commission of an offence under section 471, Indian Penal Code. The prosecution ended in an acquittal. Rustomji filed a suit claiming damages for malicious prosecution against both of them. During the pendency of the suit Rajagopala died. The question was whether the suit abated against him. Coutts Trotter, J. with whom Ayling, J., agreed, considered that section 89 of the Probate and Administration Act, 1881, applied and that Act XII of 1855 did not, since the latter Act did not deal with a suit during the pendency of which one of the parties died. The result was that the suit, it was held, had abated as against Rajagopala. Kumaraswami Sastri, J., while agreeing with this conclusion, referred to Legal Representatives' Suits Act XII of 1855 and pointed out at page 375:

> "A right of action was given against the executors, administrators, heirs or representatives of a deceased person for any wrong committed by him in his lifetime for which he would have been subject to action if such wrong was committed within one year before his death."

At page 376 he added:

> "The remedy given by the Indian Act of 1855 is, however, confined to suits brought subsequent to the death of the person."

8. Section 89 of the Probate and Administration Act, 1881 considered in that judgment corresponds to section 306 of the Indian Succession Act. That section runs as follows:

> "All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation or assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where after the death of the party, the relief sought could not be enjoyed or granting it will be nugatory."

9. A plain reading of this section would show that it addresses itself to cases where the proceedings are by or against the executors and administrators. In the present case, the proceedings are not taken either by or against the executors or administrators. Therefore, there is no scope for applying the provisions of section 306 on the facts here.

10. My attention was drawn to a decision of the Judicial Commissioner's Court of

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1. 40 M.L.J. 173: (1921) I.L.R. 44 Mad. 357: 14 L.W. 200: A.I.R. 1921 Mad. 1 (F.B.)

Nagpur in *Deeba* v. *Babaia*[1]. The facts in that case are not clear. The question in that case was whether a Hindu son could be held liable for torts committed by his father during the father's lifetime even if the torts resulted in no benefit to the joint estate. It was held that a Hindu son could be held liable for the torts committed by his father during his father's lifetime only to the extent to which the family estate has been benefited. Reliance was placed in this connection on a decision, in *Philips* v. *Hemfrey*[2]. As already seen, the position relating to applicability of the maxim *actio personalis moritur cum persona* has undergone modification in 1934 even in U.K. This maxim has also been criticised even in Britain as seen already. At any rate, the maxim has no application where provision to the contrary has been made by the statute in Legal Representatives' Suits Act XII of 1855. That Act was promulgated on the 27th March, 1855. The preamble to that Act provided that it was expedient to enable executors, administrators or representatives in certain cases to sue and be sued in respect of certain wrongs which, according to the present law, did not survive to or against such executors, administrators or representatives. Section 1 of that Act falls into two parts. The first part refers to maintainability of the action by the executors, administrators or representatives of any deceased person for any wrong committed in the lifetime of such person. We are not concerned with any suit by executors, administrators or representatives. For the present, we are concerned with the suit against the heirs of a deceased person. There can be no dispute that the plaintiff could have proceeded against Nagammal herself if she were alive. The only point is whether her heirs are liable with reference to this liability. On this point, the second part of section 1 is relevant and it may be quoted here:

> "And further, an action may be maintained against, the executors or administrators or heirs or representatives of any person deceased for any wrong committed by him in his lifetime for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death; and the damages to be recovered in such action shall, if recovered against an executor or administrator bound to administer according to the English Law, be payable in like order of administration as the simple contract debts of such person."

In effect, with reference to a suit against the executors, administrators or heirs or representatives of any deceased person in respect of any wrong committed by him in his lifetime, there is the liability to pay damages and that is why a period of one year has been fixed as the period of limitation for commencing any such action. In the present case, there is no dispute about the action having been commenced within the period of one year. Therefore, the suit is very much within the scope of provisions of section 1 of Act XII of 1855 and has been instituted within the period contemplated by it. The suit is thus maintainable against the heirs of Nagammal. It may be pointed out that while the first part of section 1 does not contemplate *heirs* commencing proceedings, the second part provides for suits being instituted against, amongst others, the heirs. This clearly goes to confirm the view that the suit was liable to be filed against heirs also. The maxim above referred to has no application here. The maintainability of the suit is thus not open to any doubt.

11. The last point is as regards the sum of Rs. 10,000 fixed as compensation. It is in evidence that the plaintiff sustained the injury and lost his right arm when he was aged about 11. He had to undergo treatment in the Railway Hospital here and later he had to go to Poona for getting an artificial limb fitted. With the artificial limb, he is able just to take his food, etc. The service of the arm is not as useful as it would have been, if he had the original limb. He was reading in the fifth standard at that time and he continued his studies upto 7th standard and ultimately he had to give up his studies for reasons which we need not go into. Even as a casual labourer, he would have been in a position to earn a sum of Rs. 100 per month. A sum of Rs. 10,000 awarded to

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1. A.I.R. 1927 Nag. 337.
2. (1883) 24 Ch.D. 439.

him would only bring an amount of Rs. 1,000 per annum by way of interest if deposited in a Nationalised Bank. He gets a monthly income of about Rs. 80 per month. I do not consider that in a case like this, the compensation so awarded can be said to be excessive. The appeal is accordingly dismissed. No costs.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan and A. Varadarajan, JJ.*

Messrs. Rockweld Electrodes India Ltd., having its registered office at No. 2-C, Moores Road, Madras-6 and represented by its Director, Vishnu Prasad Chokhani .. *Appellant**

v.

K. C. Vijayan .. *Respondent.*

Master and Servant — Contract of service—Suspension of employee not provided for in contract — Employer suspending employee and preventing him from reporting for duty—Employee can treat the same as breach of contract by employer.

The employer has no right to suspend an employee if there is no provision in the contract of employment for the same or it is not the creature of a statute governing the contract and it is not an implied term in an ordinary contract between master and servant. [*Para.* 15.]

There is however a distinction between suspending the contract of service of a servant and suspending him from performing the duties of his office on the basis that the contract is subsisting which is important. The suspension in the latter case is always an implied term in every contract of service. When an employee is suspended in this sense, it means that the employer merely issues a direction that he should not do the service required of him during a particular period. In other words the employer is regarded as issuing an order to the employee which because the contract is subsisting the employee must obey. [*Para.* 16.]

In the instant case the employer had prevented the employee from reporting for duty and committed breach of the contract of service between the parties and the employee had accepted the position that the employer had committed breach of the contract. [*Para.* 32.]

If the employer suspends an employee and prevents him from reporting for duty in the absence of any term of contract of service between the parties or any statute governing the same, it is open to the employee to treat it as a breach of contract on the part of the employer and seek his remedies on that footing. [*Para.* 15.]

Cases referred to:—

Hotel Imperial v. *Hotel Workers' Union,* (1960) 1 S.C.R. 476: 1960 S.C.J. 317: (1960) M.L.J. (Cr.) 207: A.I.R. 1959 S.C. 1342; *V. P. Gindronuja* v. *State of Madhya Pradesh,* (1970) 2 S.C.J. 573: (1970) 3 S.C.R. 448: A.I.R. 1970 S.C. 1494; *T. Gajee* v. *U. Jormanik Siem,* (1961) 1 S.C.R. 750: A.I.R. 1961 S.C. 276; *R. P. Kapoor* v. *Union of India,* (1964) 5 S.C.R. 431: A.I.R. 1964 S.C. 787; *Balvantray Ratilal Patel* v. *State of Maharashtra,* (1968) 2 S.C.R. 577: (1968) 2 S.C.J. 540: A.I.R. 1968 S.C. 800; *District Council* v. *Vithal Vinayak,* A.I.R. 1941 Nag. 125; *Marshall* v. *English Electric Co. Ltd.,* (1945) 1 All E.R 653; *Howard* v. *Pickford Tool Co., Ltd.,* (1951) 1 K. B. 411; *Heyman* v. *Darwins Ltd.,* 1942 A. C. 356; *Henely* v. *Prease & Partners Ltd.,* (1915) 1 K.B. 698; *Lanston* v. *Auew,* (1974) 1 All E.R. 980.

Appeal against the decree of the Court of the Subordinate Judge, Chingleput dated 2nd February, 1973 and passed in O.S. No. 80 of 1970.

M. R. Narayanaswami and *N. Balasubramanian,* for Appellant.

Vedantam Srinivasan and *K. Yamunan,* for Respondent.

* A.S.No. 84 of 1974. *1st August,* 1978.

The Judgment of the Court was delivered by *Varadarajan, J.*—The plaintiff in O.S. No. 80 of 1970 on the file of the Sub-Court, Chingleput, is the appellant. The suit was filed for recovery of a sum of Rs. 28,676.01 made up of a sum of Rs. 21,507.01, being the amount payable by the defendant on account of the money spent by the plaintiff on his foreign training and Rs. 7,169 being the liquidated damages payable as per the contract of service, Exhibit A-4 between the parties.

2. The case of the plaintiff was this: The defendant was employed under the plaintiff as Formulator from about September, 1965. He was subsequently deputed to take training in England on the plaintiff providing funds for the purpose. After completion of his training and return to India, he was to serve the plaintiff for the stipulated period in consideration of the plaintiff having sponsored and provided for his stay and training in England. An agreement, Exhibit A-4, dated 7th October, 1969, was entered into between the parties embodying the terms and conditions of service. According to the agreement, the defendant shall remain in the service of the plaintiff from 15th October, 1968 till 14th October, 1972 in consideration of the plaintiff having sponsored and provided him training in England. In case the defendant were to leave the services of the plaintiff before the completion of the minimum period of service mentioned in the agreement or brings about a situation by misconduct or in any manner except for reasons beyond his control compelling the plaintiff to terminate his services, the defendant has to refund all the amounts spent by the plaintiff in connection with his training abroad. Further, the defendant shall be liable to pay to the plaintiff as liquidated damages a sum equivalent to 1|3rd of the total amount incurred by the Company on his training and becoming refundable as provided in the agreement. If the defendant leaves the services of the company after completing one year of service under the agreement, he shall be liable to refund only such proportion of the several amounts and the liquidated damages stipulated in the agreement as the service remaining to be rendered by him bears to the total service from the date of his reporting after training till 31st December, 1972. For this purpose, service remaining to be rendered under the service contract will be rounded off into full years less than six months being ignored and six months or more being treated as full year. If the defendant fails to pay the said amount, the Company would be entitled to recover the same from him and also have the right to withhold all his dues and adjust the same against the amount payable to him in accordance with the provisions in the agreement. The defendant is bound to diligently and faithfully and to the best of his skill and ability serve the plaintiff and perform all the duties pertaining to his job and devote the whole of his attention and energy to his duty and shall and will do all such things as may from time to time and at any time during such term be reasonably required of him by the plaintiff or any other person or persons employed by the plaintiff and having the authority to require the same to be performed by the defendant. Notwithstanding anything contained in the agreement, the plaintiff shall be at liberty to terminate the engagement of the defendant forthwith in any of the following events, namely: (1) if the defendant failed, refused or neglected to carry out and perform his duties and undertakings; (2) if the defendant was guilty of any fraud, insubordination or misconduct in the course of performance of his duties; (3) if the defendant commits any act which is prejudicial to the continued relationship between the plaintiff and the defendant; and (4) if the defendant commits breach of any of the terms of the service contract. In any such event, the employment of the defendant shall absolutely cease and determine upon delivery of a notice of termination to him either personally or by sending the same by registered post and he shall become liable to refund the training expenses and to pay liquidated damages to the Company in the same manner as provided for in the agreement. The defendant who later became Development Officer-in-charge was attending to his duties as contemplated in the agreement till about March, 1969 and he thereafter absented himself on several occasions without leave or prior permission from his superiors and there was also a definite attitude of indifference to his duties, and in

fact, his outturn of work showed neglect of duty and want of diligence pertaining to his job. The plaintiff first preferred to overlook some of the acts of absence without leave but when persisted in and when the defendant left the factory on 15th July, 1969 to attend a lunch without obtaining previous permission but merely placing a written request for half a day's casual leave on the office table and further, when he again absented himself from 17th July, 1969 on grounds of fever and sickness it was found that he had no fever but though moving about expressed that he had back-sprain and subsequently sent a medical certificate which referred only to back-sprain, the plaintiff by their President called for a reasonable assurance from the defendant to the full satisfaction of his superiors that he will not repeat such acts of gross indiscipline in future. The defendant in reply thereto denied having committed any act of indiscipline and stated that the need for reasonable assurance did not arise at all and assumed an attitude inconsistent with his position as employee under the plaintiff. The defendant, however, offered to join duty on 28th July, 1969. But, with reference to the letter of the plaintiff to him, dated 24th July, 1969 he was called upon to express regret for his previous mistakes and misdemeanours by tendering an apology to close the correspondence as to the conduct of the defendant and to continue him in service so as to have the benefit of his training in England for the company; the defendant refused to tender any apology or express regret or give an assurance. On 28th July, 1969 when he was not permitted to join duty without such assurance, he sent a lawyer's notice alleging that the plaintiff had unilaterally rescinded the contract of service and had also committed breach of contract and made some claims against the plaintiff on that footing. The plaintiff by their reply notice, dated 30th July, 1969, made it perfectly clear that there was no rescission of the contract. The defendant was called upon to explain the various acts which amounted to misconduct and pending investigation, he was placed under suspension as the plaintiff intended to hold a regular enquiry into the conduct of the defendant after framing a charge. Charges were accordingly framed and communicated to the defendant by letter, dated 30th July, 1969, and he was informed that an enquiry would be held on 7th August, 1969. The defendant sent a reply repudiating the charges and stating that he had ceased to be the plaintiff's employee with effect from 8 A.M. on 28th July, 1969 and that he was not obliged to attend any enquiry. The defendant did not attend the enquiry on 7th August, 1969 and after giving a further opportunity and holding the enquiry on 16th August, 1969, it was found that the defendant was guilty of the charges. The plaintiff by their letter, dated 20th August, 1969, communicated the findings of the Enquiry Officer to the defendant and pointed out that his conduct was prejudicial to the continued relationship of employer and employee and that with a view to give one more chance, they (Plaintiff) had decided to take a lenient view and let him off with suspension without pay for the period from 28th July, 1969 to 22nd August, 1969 and required him to report for duty on 23rd August, 1969. The defendant did not report for duty on 23rd August, 1969 and took up a defiant attitude that he had ceased to be an employee of the plaintiff with effect from 8 A.M. on 28th July, 1969. The plaintiff sent another charge-sheet to the defendant dated 13th September, 1969, calling for written explanation for absence without leave for 22 days, from 23rd August, 1969 and on no reply being received fixed an enquiry to be held in respect of the said charge on 6th October, 1969 and informed the defendant of the same by letter, dated 30th September, 1969. The defendant chose to remain *ex parte* at the enquiry. The Enquiry Officer found that the defendant was guilty of absence without leave for the period from 23rd August, 1969 to 13th September, 1969. The plaintiff accepted the finding of the Enquiry Officer and terminated the engagement of the defendant with effect from 7th October, 1969 and communicated the same to the defendant on the same date. Far from there being any rescission of contract or breach thereof on the part of the plaintiff, it was the defendant who had brought about a situation by his acts of misconduct compelling the plaintiff to terminate his engagement and he had consequently become liable under the terms of clause 4 of the agreement, Exhibit A-4, to pay the plain-

tiff Rs. 21,507.01 p. towards the amount spent by them in connection with his training abroad and also to pay the plaintiff a sum of Rs. 7,169 by way of liquidated damages, and he had not paid the same in spite of lawyer's notice dated 5th December, 1969.

3. The defence was that the plaintiff was not properly represented by the Director who had no personal knowledge of the allegations made in the plaint. According to the defendant, the proper person who should have verified the plaint and represented the Company was A. H. Dalmia, the President-in-charge of the plaintiff-Company. The defendant did not have anything to do with the Director, Sri Satyanarayanan who has signed the plaint as he had no personal knowledge of the matters alleged in the plaint. Regarding the merits of the case, the defence was that at all material times, the defendant had been extremely diligent in the discharge of his duties and had devoted his entire working hours for the benefit of the plaintiff-Company. The defendant had never absented himself even for one day for any purpose without any leave or prior permission of his superiors; nor had he shown any indifference towards his work. He continued his employment under the plaintiff in spite of the many obstructions placed by the said Shri A. H. Dalmia. Labour relations had worsened and relations between the management and personnel deteriorated because of the attitude taken by the new management. The defendant sent a leave letter to the plaintiff when he fell ill and had a sprain and also produced a medical certificate. The President, A. H. Dalmia of the plaintiff, and another employee came to the defendant's house and not finding him there, they went to the doctor's house and found that the defendant was really unwell and could not attend office on 17th July, 1969. Shri A. H. Dalmia wanted an assurance from the defendant on 28th July, 1969, when he sought to rejoin duty that he (defendant) will not fall ill or otherwise be indisposed without prior notice. The defendant could not naturally give any such assurance as asked for and he stated that there was no need or occasion for giving apology for having fallen ill or for matters beyond his control or power. The plaintiff wrongfully prevented the defendant from joining duty and committed breach of the contract of service and unilaterally repudiated the contract and rescinded the same against law. Therepon, the defendant sent a lawyer's notice on the very same day making it clear that the plaintiff had committed breach of the contract and claiming reliefs on that basis. The plaintiff had no power or jurisdiction to hold any enquiry after 28th July, 1969. The defendant was not guilty of any misconduct and was not liable to pay any amount.

4. The learned Subordinate Judge framed the following issues:

*   *   *   *   *

(Issues Omitted:—Ed.)

On issues 1 and 2, he found that the suit had been properly framed and that Sri Satyanarayana, the then Director of the plaintiff-Company was competent to represent the plaintiff on the date of plaint. On issues 3 to 11, he found that the plaintiff unilaterally rescinded the contract of employment and committed breach of the contract, that the defendant has not committed any misconduct, that the defendant became absolved from all his obligations under the contract of employment after 28th July, 1969, that the plaintiff is not entitled to hold any enquiry against the alleged misconduct of the defendant after that date, that the enquiry has not been properly and validly held, that the plaintiff was not entitled to dismiss the defendant on the basis of the charges laid against him, that the conduct of A. H. Dalmia, the President of the plaintiff-Company has been *mala fide,* malicious and illegal in so far as it related to his dealing with the defendant and that the plaint was not defective. On issue No. 12 he found that there was no cause of action after 28th July, 1969, for instituting the suit against the defendant as he had ceased to be an employee of the plaintiff on account of breach of the contract of service committed by the plaintiff on 28th July, 1969. On issue No. 13, he found that this is not a fit case for awarding costs in favour of the defendant. On these findings, he dismissed the suit without costs.

5. Mr. M. R. Narayanaswami, the learned counsel for the appellant, submitted that there

is no dispute between the parties regarding the expenses incurred by the plaintiff for the defendant's training in England, or the quantum of liquidated damages, that the defendant was merely suspended on 28th July, 1969, pending a contemplated enquiry, that even if there is no provision in the contract of employment for suspension of the defendant pending enquiry, the legal consequence of suspension is that the plaintiff will be liable to pay salary to the defendant for the period of suspension and it does not bring about a breach of the contract, that the defendant has committed breach of his contract and that the plaintiff will, therefore, be entitled to a decree for the amount claimed in the plaint.

6. On the other hand, Mr. Vedantam Srinivasan, the learned counsel for the respondent submitted that there was no suspension on 28th July, 1969, or on any subsequent date, that the plaintiff committed breach of the contract of service between the parties by not permitting the defendant to join duty on 28th July, 1969, that the relationship of employer and employee had thereby come to an end and that it was no longer open to the plaintiff to treat the defendant as an employee and hold any enquiry against him. He further submitted that even if there was only a suspension as contended by the plaintiff, it would amount to a breach of the contract of service between the parties in the absence of any provision for the same in that contract and that the plaintiff is, therefore, not entitled to seek to enforce the terms of that contract and recover the amount.

7. Before considering the evidence, oral and documentary in the matter, it is necessary to note the points of law to which our attention was drawn by the learned counsel for the parties in the course of their arguments. The main submission of the learned counsel for the appellant is that there was only a suspension on 28th July, 1969. 'To suspend', according to the Shorter Oxford Dictionary, is to debar, usually for a time from the exercise of a function or the enjoyment of a privilege.

8. The learned counsel for the appellant invited our attention to two decision of the Supreme Court. The first is the decision in *Hotel Imperial* v. *Hotel Workers Union*[1]. There, it has been observed in paragraph 10:

"The first question, therefore, that falls for consideration is the extent of the power of the employer to suspend an employee under the ordinary law of master and servant. It is now well-settled that the power to suspend, in the sense of a right to forbid a servant to work is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the contract or of an express term in the contract itself. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the so called period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the suspension has the effect of temporarily suspending the relation of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay......"

Relying strongly on this observation, the learned counsel for the appellant submitted that the only right which the defendant had was to claim salary for the period of his suspension if the plaintiff had no power to do so under the contract of service, Exhibit A-4, entered into between the parties. It is not disputed by the learned counsel for the appellant that there is no provision in the contract, Exhibit A-4, for the plaintiff to suspend the defendant for any period pending any enquiry into any charges framed against him.

9. The second decision relied upon by the learned counsel for the appellant is in *V. P. Gindroniya* v. *State of Madhya Pradesh*[2]. where it is observed in paragraphs 7 and 8 as follows:

"7. The legal position as regards a master's right to place his servants under sus-

1. (1960) 1 S.C.R. 476: 1960 S.C.J. 317: (1960) M.L.J. (Crl.) 207: A.I.R. 1959 S.C. 1342.
2. (1970) 2 S.C.J. 573: (1970) 3 S.C.R. 448: A.I.R. 1970 S.C. 1494.

pension is now well-settled by the decisions of this Court. In *Management of Hotel Imperial, New Delhi* v. *Hotel Workers' Union*[1], the question whether a master could suspend his servant during the pendency of an enquiry came up for consideration by this Court. Therein this Court observed that it was well-settled that under the ordinary law of master and servant the power to suspend the servant without pay could not be implied as a term in an ordinary contract of service between the master and the servant but must arise either from an express term in the contract itself or a statutory provision governing such contract. It was further observed therein that ordinarily the absence of such a power either in express terms in the contract or under the rules framed under some statute would mean that the master would have no power to suspend a workman and if he does so in the sense that he forbids the employee to work he will have to pay the wages during the so-called period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the suspension has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay.

8. The same view was reiterated by this Court in *T. Gajee* v. *U. Jormanik Siem*[2]. The rule laid down in the above decisions was followed by this Court in *R. P. Kapoor* v. *Union of India*[3]. The law on the subject was exhaustively reviewed in *Balvantary Ratilal Patel* v. *State of Maharashtra*[4]. Therein the legal position was stated thus: The general principle is that an employer can suspend an employee of his pending an enquiry into his misconduct and the only question that can arise in such a suspension will relate to the payment of his wages during the period of such suspension. It is now well-settled that the power to suspend, in the sense of a right to forbid an employee to work, is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. Ordinarily, therefore, the absence of such a power either as an express term in the contract or in the rules framed under some statutes would mean that an employer would have no power to suspend an employee of his and even if he does so in the sense that he forbids the employee to work, he will have to pay the employee's wages during the period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the order of suspension has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. It is equally well-settled that an order of interim suspension can be passed against the employee while an enquiry is pending into his conduct even though there is no such term in the contract of employment or in the rules, but in such a case the employee would be entitled to his remuneration for the period of suspension if there is no statute or rule under which, it could be withheld. The distinction between the contract of service of a servant and suspending him from performing the duties of his office on the basis that the contract is subsisting is important. The suspension in the latter case is always an implied term in every contract of service. When an employee is suspended in this sense, it means that the employer merely issues a direction to him that he should not do the service required of him during a particular period. In other words the employer is regarded as issuing an order to the employee which because the contract is subsisting, the employee must obey."

Relying upon this decision the learned counsel for the appellant submitted that 'suspension' pending an enquiry is an implied term of the contract and this decision shows development of the law subsequent to the

1. (1960) 1 S.C.R. 476 : A.I.R. 1959 S.C. 1342.
2. (1961) 1 S.C.R. 750 : A.I.R. 1961 S.C. 276.
3. (1964) 5 S.C.R. 431 : A.I.R. 1964 S.C. 787.
4. (1968) 2 S.C.R. 577 : (1968) 2 S.C.J. 540 : A.I.R. 1968 S.C. 800.

aforesaid decision in *Hotel Imperial* v. *Hotel Workers' Union*[1].

10. On the other hand, the learned counsel for the respondent invited our attention to several passages in the texts and to some English decisions and the decision in *District Council, Amraoti* v. *Vithal Vinayak*[2]. In paragraph 557 of Halsbury's Laws of England, Fourth Edition, Volume 16, it is stated:

"It now seems probable that all contracts of employment by implication give to the employee not merely the right to be paid his agreed wage, but also the right to have the opportunity of doing his work when it is available."

In paragraph 584 of this book, it is stated:

"Whether or not an employer has power to suspend an employee during the duration of the contract of employment depends upon the construction of the particular contract. In the absence of any express or implied term to the contrary, the employer cannot punish an employee for alleged misconduct by suspending him from employment and stopping his wages for the period of the suspension. Where, however, such a term is included in the contract, it is not rendered void by the statutory provision restricting deductions from workmen's wages for or in respect of fines, for the intention of the parties is taken to have been that for the period of suspension mutual duties and rights, including the right of wages, would be suspended."

At pages 534 and 535 of the Law of Contract, Seventh Edition, by Cheshire and Fifoot, we find the following passage:

"It must be observed, however, that it takes two to end a contract. It cannot be terminated unilaterally. Therefore, if one party repudiates his obligations or fails to perform a term of vital importance this does not automatically terminate the contract. It merely gives the innocent party an option either to ignore the breach and to insist upon performance when due, or to accept it as decisive and to treat himself as free from further liability. If, for instance, he ignores a repudiation, the contract remains in full force. An unaccepted repudiation is a thing writ in water and of no value to anybody."

"If the innocent party elects to treat the contract as discharged, he must expressly or implicitly communicate the decision to the party in default. Once he has made his intention clear, his election is final and cannot be retracted. A party who elects to pursue this course is generally said to rescind the contract, but this is a misleading word in the present context. In its primary and more correct sense, as we have already seen rescission means the retrospective cancellation of a contract *ab initio* as for instance where the defendant has been guilty of fraudulent misrepresentation. The contract is destroyed as if it had never existed. But, where a party elects to treat a breach as discharging him from his obligations, the effect is to terminate the contract from the moment of the election and not earlier........

"If, on the other hand, the innocent party with full knowledge of the facts, makes it clear by words or acts that he insists on holding his co-contractor to the bargain and continues to render performance the effect is to keep the contract alive......"

11. In Cases and Materials on Labour Law, 1967 Edition, by K. W. Wedderburn, the following observation of Lord Goddard made in *Marshall* v. *English Electric Co., Ltd.*[1], is extracted at page 145:

"In my opinion, what is called suspension is in truth dismissal, with an intimation that, at the end of so many days, or it may be hours, the man will be re-employed, if he chooses to apply for re-instatement.

This indeed seems to be the effect of the evidence, as the witnesses called for the defendants appear to agree that a suspended man can go off and seek employment elsewhere; if he chooses, to do so, he is under no obligation to return if he does not wish to submit to suspension."

1. (1960) 1 S.C.R. 476 : A.I.R. 1959 S.C. 1342.
2. A.I.R. 1941 Nag. 125.

1. 1945 All E.R. 653.

At pages 152 and 153 of the same Edition, the following observations of Eversheld, M. R., and Asquith, L. J., in *Howard* v. *Pickford Tool Co., Ltd.*[1], are set out:

"Evershed, M. R.: it is quite plain and I refer, if it be necessary to quote authority, to the speech of Lord Simon, L.C., in *Heyman* v. *Darwins Ltd.*[2], that if the conduct of one party to a contract amounts to a repudiation, and the other party does not accept it as such but goes on performing his part of the contract and affirms the contract, the alleged act of repudiation is wholly nugatory and ineffective in law."

"Asquith, L. J.: An unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind."

Section 39 of the Indian Contract Act reads thus:

"When a party to a contract has refused to perform or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

12. We find the following passage at page 358 of Pollock and Mulla's Indian Contract and Specific Relief Acts, 9th Edition:

"The wrongful dismissal of a servant by a master operates instantly giving the servant the instant right to claim damages. But this general rule will not apply where the servant continues to work for the employer, the employment does not terminate ....".

13. In *Hanely* v. *Please & Partners Limited*[3], Lush, J., with whom Rowlatt and Atkin, JJ., agreed, has observed:

"......Assuming that there has been a breach on the part of the servant entitling the master to dismiss him, he may, if he pleases terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding misconduct or breach of duty of the servant, then the contract, is for all purposes a continuing contract subject to the master's right in that case to claim damages against the servant for his breach of contract. But, in the present case after declining to dismiss the workman—after electing to treat the contract as a continuing one, the employers took upon themselves to suspend him for one day; in other words to deprive the workman of his wages for one day, thereby assessing their own damages for the servant's misconduct at the sum which would be represented by one day's wages. They have no possible right to do that. Having elected to treat the contract as continuing it was continuing. They might have had a right to claim damages against the servant but they could not justify their act in suspending the workman for the one day and refusing to let him work and earn wages. The case must be remitted to the justices with a discretion to award to the appellant whether under the denomination of wages or damages the sum of 6sh, 2d., which represents the wages the workman would have earned on the day he was suspended but which he did not earn owing to the employer's breach of contract".

In *Lanston* v. *Auew*[1], Lord Denning, M.R., observed thus:—

"......We have repeatedly said, in this Court that a man has a right to work which the Courts will protect......In these days an employer, when employing a skilled man, is bound to provide him with work. By which I mean that the man should be given the opportunity of doing his work when it is available and he is ready and willing to do it. A skilled man takes a pride in his work. He does not do it merely to earn money. He does it so as to make his contribution to the well-being of all. He does it so as to keep himself busy, and not idle. To use his skill, and to improve it. To have the satisfaction which comes of a task well done. Such

1. (1951) 1 K.B. 411.
2. (1942) A.C. 356 at 361.
3. (1915) 1 K.B. 698 at 705.

1. (1974) 1 All E.R. 980 at 987.

as Longfellow attributed to the village blacksmith—Something attempted, something done, has earned a night's repose'..... If this be correct, then if any person knowingly induces the employer to turn the man away and thus deprive him of the opportunity of doing his work then that person induces the employer to break his contract. It is nonetheless a breach, even though the employer pays the man his full wages. So also when fellow-workers threaten to walk out unless a man is turned off the job, they threaten to induce a breach of contract. At any rate, the man who is suspended has a case for saying that they have induced or threatened to induce the employer to break the contract of employment".

Vivian Bose, J., has observed in: *District Council* v. *Vithal Vinayak*[1]:

"A local body has no more authority and power over its servants and employees than any other person or body unless such powers are expressly conferred by statute. The matter, therefore, must be governed along the ordinary lines of master and servant.

It is to my mind clear that an ordinary master not given special powers by statute or by some rule of law flowing from a statute has no power to suspend a servant. He can either dismiss him or continue him in service on fresh terms. In either case the servant is entiled to be paid up to the date of dismissal in the one case or of continuance in service in the other...... A servant who is suspended is clearly not working in the interval. If therefore a servant who is dismissed is entitled to be paid his wages upto the date of dismissal, it is clear that a servant who has not been dismissed but continued in service has a right to similar treatment".

"In an ordinary case of master and servant, a master who dismisses his servant has to justify his action in a Court of law if the servant brings an action for wrongful dismissal. If the servant succeeds in showing that the dismissal was without justification, he is entitled either to his wages or to damages. If a master has no power of suspension, then he can only justify a refusal to pay the wages during the period of suspension on the ground that he had a right to dismiss the servant because of some wrongul action justifying dismissal or that instead of exercising the right he came to a fresh agreement with the servant under which the servant rather than be dismissed agreed to forego his salary during a certain period and agreed to continue to serve on fresh terms under a fresh contract. But, it would be necessary for the master to prove in such a case first, that there is this fresh agreement, and secondly that he was justified in dismissing the servant and thus forcing him into a fresh engagement ....".

1. A.I.R. 1941 Nag. 152.

14. From the aforesaid passages and decisions relied upon by the learned counsel for the respondent and from the decision of the Supreme Court in *Hotel Imperial* v. *Hotel Workers' Union*[1], it would appear that the employer has no right to suspend an employee if there is no provision in the contract of employment for the same or it is not the creature of a statute governing the contract and it is not an implied term in an ordinary contract between master and servant. It would also appear from those passages and the decision in *Hotel Imperial* v. *Hotel Workers Union*[1], that if an employer suspends an employee, in the absence of any term of contract of service between the parties or any statute governing the same, it is open to the employee to treat it as a breach of contract on the part of the employer and seek his remedies on that footing.

15. But, a departure has been made by the Supreme Court in the subsequent decision in *V. P. Gindroniya* v. *State of M.P.*[2], wherein in paragraph 8 as extracted above, it is observed:

"The distinction between suspending the contract of service of a servant and suspending him from performing the duties of his

1. 1960 S.C.J. 317: A.I.R. 1959 S.C. 1342.
2. (1970) 2 S.C.J. 573: A.I.R. 1970 S.C. 1494.

office on the basis that the contract is subsisting is important. The suspension in the latter case is always an implied term in every contract of service. When an employee is suspended in this sense, it means that the employer merely issues a direction to him that he should not do the service required of him during a particular period. In other words the employer is regarded as issuing an order to the employee which because the contract is subsisting, the employee must obey".

16. On the side of the plaintiff-appellant, two witnesses, namely, A. H. Dalmia, President of the plaintiff-Company and one Swamidoss, Personnel Manager of Dalmia Cements (Bharat) Ltd., Dalmiapuram, the Enquiry Officer who submitted the findings, Exhibits A-42 and A-43 in this case were examined as P.Ws. 1 and 2. The defendant is the only witness examined on his side. P.W. 2 has deposed only about the enquiry conducted by him. P.W. 1 and D.W. 1 have deposed about the relevant facts of the case. But, before considering the oral evidence of these witnesses, we think it necessary to refer to the relevant main documents in the case.

17. Exhibit A-4 is the service contract which had been entered into between the parties after the defendant, who had been deputed for training in England, when the management of the plaintiff-Company was with his grand-uncle Mr. Tatachari, returned from England after the completion of his training. The main terms of the agreement have been set out in the plaint and referred to in this judgment. There is no dispute between the parties regarding the same. There will be no difficulty in holding that the defendant would be liable for the suit amount if he had committed breach of the contract, Exhibit A-4 by refusing to turn up for duty after 28th July, 1969.

* * * * *

(Discussion of facts omitted—Ed.).

Having regard to the strained feelings between P.W. 1 and the defendant and having regard to the stand taken by P.W. 1 in Exhibits A-7 and A-8 on 19th July, 1969, itself that the defendant will not be permitted to join duty until he gave a reasonable assurance to the full satisfaction of the superiors that he will not repeat acts of gross indiscipline in future and the intervening correspondence between the parties, it is probable that P.W. 1, had refused to permit the defendant to report for duty when he came to the factory at about 8 A.M. on 28th July, 1969, with the necessary medical certificate and fitness certificate as alleged in the notice Exhibit A-15 which was sent on the very same day. It was only in the lawyer's reply notice, Exhibit A-18 sent on 30th July, 1969, that the case that the defendant was only suspended on 28th July, 1969, was put forward for the first time. The contention of the defendant is that this change in the stand taken by the plaintiff had taken place only as a result of the plaintiff having consulted their lawyers after the plaintiff had been confronted with the defendant's lawyer's notice, Exhibit A-15 where it had been clearly alleged that the defendant had not been permitted by P.W. 1 to report for duty on that day and he was called upon to tender an apology and to give an assurance that he would not repeat acts of gross indiscipline in future. It may be so. In these circumstances, we prefer to accept the evidence of D.W. 1 that there was no suspension on 28th July, 1969, and that P.W. 1 prevented him from reporting for duty and insisted upon his tendering an apology and giving an assurance, and we are of the opinion that the evidence of P.W. 1 that there was only a suspension on that day and that he did not prevent the defendant from reporting for duty and commit breach of the contract of service Exhibit A-4 is not acceptable. It is not consistent with the stand taken by the plaintiff in Exhibits A-7 and A-8. The plaintiff had no right to insist upon an apology and assurance not to repeat acts of gross indiscipline in future on 28th July, 1969, as a condition precedent to his being allowed to join duty even without holding an enquiry into the disputed acts of gross indiscipline. The allegation in paragraph 6 of the plaint shows that the alleged misconduct of the defendant by way of absence in March and May, 1966 had been condoned by the plaintiff. The evidence of P.W. 1 shows that deduction has been made in the salary of the defendant for his absence in May, 1969.

However, the defendant's alleged absence without leave in March and May, 1969 also has been made a ground of charge in the memorandum of charges, Exhibit A-16 issued to the defendant. This would show that P.W. 1 was actuated by malice against the defendant even after 28th July, 1969. The defendant had the right to work on 28th July, 1969. The act of he plainiff in not permitting the defendant to perform his duty on 28th July, 1969, clearly amounts to breach of contract of service between the parties.

32. The plaintiff had prevented the defendant from reporting for duty on 28th July, 1969, and committed breach of the contract of service, Exhibit A entered into between the parties, and the defendant had accepted the position that the plaintiff had committed breach of the contract and sent the lawyer's notice Exhibit A-15 saying that the relationship of the employer and employee between the parties had ceased thereby, and that therefore, he was free to seek employment elsewhere or to do his own business. Subsequently, the plaintiff had no right to hold any enquiry against the defendant and to terminate the already broken agreement, Exhibit A-4 by Exhibit A-33 and call upon the defendant to pay the money spent for the training and stay of the defendant abroad and also the liquidated damages claimed by them.

33. No argument was advanced by the learned counsel for the respondent regarding the maintainability of the suit, and it was not contended that merely because Mr. Satyanarayana, who has signed the plaint as the Director of the plaintiff-company did not know the facts of the case, he was not entitled to sue on behalf of the plaintiff-company. It has not been contended that he was otherwise not entitled to sue on behalf of the company. Therefore, we agree with the learned Subordinate Judge that Mr. Satyanarayana who was the Director of the plaintiff-company until he resigned and was succeeded by Mr. Vishnuprasad Chokhani, the present Director, was competent to sue on behalf of the plaintiff and that the suit as framed is maintainable. But, in view of our finding that the plaintiff has committed breach of the contract of service, Exhibit A-4 between the parties by preventing the defendant from reporting to duty on 28th July, 1969, after the expiry of the leave which had been applied for on the ground that the defendant was unwell for which necessary medical certificate had been produced by the defendant, and that position had been accepted by the defendant in the lawyer's notice Exhibit A-15, we hold that the plaintiff is not entitled to recover any portion of the amount spent for the defendant's stay and training in England or any liquidated damages as per the agreement, Exhibit A-4.

34. We confirm the judgment and decree of the learned Subordinate Jduge and dismiss this appeal with costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, CJ.*

Mesdames Tara Moolgaukar and others .. *Petitioners**

v.

T. Raja Mohan Rao .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *sections* 10 (2) (i), 10 (2) (iii)—*Petition for eviction — Tenant's not paying Corporation tax for building not tantamount to wilful default — Use of garage by tenant as dormitory not an act of waste.*

The landlord filed a petition for eviction of the tenant under section 10 (2) (*i*) and 10 (2) (*iii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The landlord claimed that the tenant did not pay the corporation tax due and that the tenant used the garage in the building as dormitory and committed an act of waste. The Rent Controller allowed the petition of the landlord. On appeal by the tenant, the Appellate Authority allowing the same held that the Corporation tax was not payable by the tenant. Further the Appellate Authority held that the landlord had not established any acts of waste committed by the tenant in using the garage as a dormitory. On revision to the High Court by the landlord,

* C.R.P.No. 829 of 1977. *15th February,* 1979.

Held: Corporation tax was payable by the owner, though, of course, there was a statutory right to the Corporation, in certain circumstances, to collect the same, when it was in default, from the tenant in occupation. But that by itself, did not mean that non-payment of Corporation tax by the tenant would be a ground for eviction under section 10 (2) (*i*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. As this was a legislation which had to be interpreted strictly, unless there was default in the payment of rent which was the consideration for the demise, there could not be any default, if such rent had been paid in accordance with the terms of the lease. [*Para.* 2.]

Section 10 (2) (*iii*) is a very stringent provision, and therefore, it becomes all the more necessary for Courts, to administer it cautiously and accept the request of the landlord for eviction only under stated circumstances which satisfy every limb of the sub-section. By using a garage as a room it could not be said that the tenant had committed acts of waste. In the absence of any evidence to show that by such user the utility of the building had been materially impaired, it could not equally be said that the tenant had committed any acts of waste which would come within the mischief or meaning of section 10 (2) (*iii*) of the Act. [*Para.* 3.]

Petition under section 25 of the Madras Buildings (Lease and Rent Control) Act, 1960 read with section 115, Civil Procedure Code, praying the High Court to revise the order of the Small Cause Court, Madras in H.R. A. No. 212 of 1976 in H.R.C. No. 691 of 1974.

B. R. Dolia of *M/s. Aiyar & Dolia,* for Petitioners.

B. Thanikachalam, for Respondent.

The Court made the following

ORDER.—The landlords who failed before the appellate authority in an application filed by them under sections 10 (2) (*i*) and 10 (2) (*iii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, are the petitioners herein. The case of the petitioners is that they let out the premises in question to the respondent on a monthly rent of Rs. 700 plus Rs. 300 for fittings, etc., under a lease deed, dated 1st August, 1972, for the purpose of running a boarding and lodging house. The lease deed also provided that the demised premises shall take into its fold a garage. The main contention of the petitioner was that the tenant-respondent did not pay the Corporation tax due and payable for the premises, which, according to the petitioners, was payable by the tenant under the terms of the lease and that the respondent used the garage as a dormitory and had thus committed or caused to be committed such acts of waste as are likely to impair materially the value or utility of the building. On the evidence let in, the Rent Controller was satisfied that there was such imparing of the utility of the building and granted eviction. He also thought that there was a legal obligation on the part of the tenant to pay the Corporation tax due and that not having been paid that could be taken as wilful default on the part of the tenant in the matter of the payment or tendering of the rent payable for the premises.

2. The Appellate Authority found that, on the ground of non-payment of Corporation tax, the tenant-respondent could not be evicted. In fact, be found that there was absolutely no evidence to show that the Corporation tax was payable by the tenant as part of the rent of the building in question. Section 10 (2) (*i*) would be attracted only in a case where the rent which was agreed to as the consideration for the occupation of the premises had not been paid or tendered by the tenant. Inasmuch as there is nothing on record to show that under the terms of the lease, dated 1st August, 1972, the tenant had undertaken to pay the Corporation tax as part of the rent for the premises, the Appellate Authority rightly found that the petition for eviction could not be founded on the ground that there had been wilful default in the payment of rent. I agree with the said finding. Corporation tax is payable by the owner, though, of course, there is a statutory right to the Corporation, in certain circumstances, to collect the same, when it is in default, from the tenant in occupation. But that, by itself, does not mean that non-payment of Corporation tax by the tenant would be a ground for eviction under section 10 (2) (*i*). As this is a legislation which has to be interpreted strictly, I am of the view that,

unless there is default in the payment of rent which is the consideration for the demise, there cannot be any default, if such rent had been paid in accordance with the terms or the lease. I have already referred to the fact that there was no evidence that there was any legal obligation cast on the tenant to pay such Corporation tax, as part of the rent. The finding of the Appellate Authority on this aspect is, therefore, confirmed.

3. Regarding the other ground on which eviction was sought, the plea is that the tenant has converted the garage into a room and is using it as a dormitory, as the main purpose of the lease was for boarding and lodging purposes. Whatever may be the position regarding the nature of the user, as agreed to, the question before us is whether by using the garage as a dormitory, the tenant could be said to have committed or caused to be committed such acts of waste as are likely to impair materially the value or utility of the building. Section 10 (2) (*iii*) of the Act is a very stringent provision, and therefore, it becomes all the more necessary for Courts to administer it cautiously and accept the request of the landlord for eviction only under stated circumstances which satisfy every limb of the sub-section. By using a garage as a room it cannot be said that the tenant has committed acts of waste. In the absence of any evidence to show that by such user the utility of the building has been materially impaired, it cannot equally be said that the tenant has committed any acts of waste which would come within the mischief or meaning of section 10 (2) (*iii*) of the Act. This position was appreciated by the Appellate Authority, who, after considering the evidence found as a fact that the landlords had not established that any acts of waste had been committed by the tenant. He also rightly laid accent upon the non-examination of any technical person like an engineer, who might possibly speak to the impairment of the value of the building by any particular user of the same by the tenant. I also agree with the finding of the Appellate Authority that, in the absence of any evidence to show that the value of the building had been materially impaired or damaged in any manner whatever, no order for eviction could be passed under section 10 (2) (*iii*) of the Act.

4. The Appellate Authority has come to the correct conclusion and there is no ground to interfere with the same. The civil revision petition, therefore, fails and is accordingly dismissed. There will be no order as to costs.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Padmanabhan, J.*

The Honorary Secretary, Sourashtra Sabha, Madurai .. *Petitioner**

v.

The Presiding Officer of the Special Tribunal of the Urban Land Tax Appeal, Madurai and another .. *Respondents.*

Tamil Nadu Urban Land Tax Act (XII of 1966), *sections* 5, 2 (10), *Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of* 1959), *section* 6 (22) — *Perumal Temple — Kattalais or specific endowments created by several members of Sourashtra Community evidenced by registered documents —Sourashtra Sabha nominated as trustee by the settlors—Levy of urban land tax—Sabha assessed for tax as owner of all the endowments—Writ petition by Sabha, challenging assessment—Sabha held to be owner in respect of the urban land owned by each of the kattalais and liable to be taxed separately on such urban land owned by each of the kattalais.*

The Sourashtra Sabha had under its control and management a Perumal Temple. Several members of the Sourashtra community had created Kattalais or specific endowments for the performance of specific religious charities connected with the temple evidenced by registered documents. The various settlors had nominated the Sabha to be in management of the properties endowed to the Kattalais. The Assistant Commissioner of Urban Land Tax treated the Sabha as the owner of all the Kattalai properties and determined the rate of tax payable accordingly. An appeal

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* W. P. No. 661 of 1977.

10th July, 1979.

was filed by the Sabha to the Special Tribunal for Urban Land Tax Appeal on this point was not successful. The Sabha filed a writ petition.

Held: From section 6 (22) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, it was clear that a trustee was only a person in whom the administration of a particular religious institution or a special endowment vests. It was not correct to call a trustee as the owner of the property.

[*Para*. 7.]

Considering sections 5 and 2 (10) of Act XII of 1966, the person in whose hands the urban land could be charged to Urban Land Tax was the owner. The owner in the case of a religious or charitable institution should necessarily be a trustee thereof. But when the same person was a trustee for different religious or charitable endowments, it could not be said that he would be the owner in respect of the urban land owned by all the endowments together. It could only mean, that he would be the owner in respect of a land owned by the particular religious endowment. Viewed in this sense, the Sabha could not be deemed to be the owner of all the properties of the various kattalais clubbed together. It should be considered to be the owner in respect of the urban land owned by each of the kattalais and it would be liable to be taxed separately on the urban land owned by each of the kattalais.

[*Para*. 11.]

Merely because the Sabha happens to manage the urban land belonging to the various kattalais it cannot be held that the Sabha is the owner of all the properties of the kattalais put together. [*Para*. 12.]

Cases referred to:—

Sri Vidya Varuthi Thirtha Swamigal v. *Baluswami Ayyar,* (1921) 48 I.A. 302: I.L.R. 44 Mad. 831: 41 M.L.J. 346: 15 L.W. 78: A.I.R. 1922 P.C. 123; *R. M. AR. AR. RM. AR. Ramanathan Chettiar* v. *Commissioner for Hindu Religious and Charitable Endowment,* (1978) 91 L.W. 237; *President, Board of Commissioners for Hindu Religious Endowments* v. *Nagarathina Mudaliar,* (1935) 68 M.L.J. 549: 41 L.W. 454: A.I.R. 1935 Mad. 417; *Vaidyalinga Pandara Sannadhi* v. *Ramalinga Mudaliar,* (1934) 39 L.W. 205: 66 M.L.J. 98: I.L.R. 57 Mad. 362: A.I.R. 1934 Mad. 126; *State of Madras* v. *Pattammal,* (1966) 62 I.T.R. 485; *Mariam Aysha* v. *Commissioner of Agricultural Income-tax,* (1976) 104 I.T.R. 381.

O. V. Baluswami, M. R. Rajagopalachari and *R. S. Sundararaman,* for Petitioner.

Additional Government Pleader, for Respondents.

The Court made the following

ORDER.—The Honorary Secretary, Sourashtra Sabha, Madurai has filed this writ petition for the issue of a writ of a *certiorari* to quash the order, date 15th November, 1973, passed by the Assistant Commissioner, Madurai West and confirmed by the Presiding Officer (Subordinate Judge) of the Special Tribunal of the Urban Land Tax Appeals, Madurai. The matter arises under the Tamil Nadu Urban Land Tax Act, 1966.

2. It is stated in the affidavit filed in support of the writ petition that the Sourashtra Sabha, hereinafter referred to as the Sabha, has under its control and management a denominational temple known as Sri Prasanna Venkatesa Perumal Temple at Madurai. Several members of the Sourashtra community have created Kattalais or specific endowments for the performance of some specific religious charities connected with the said temple and the Kattalais are evidenced by registered documents. By these documents, the various settlors have nominated the Sabha to be in management of the properties endowed to the kattalais.

3. While so, the Secretary of the Sabha submitted returns in terms of the provisions of the Tamil Nadu Urban Land Tax Act, 1966. The returns contained particulars regarding 32 items. Out of these 32 items, item Nos. 1, 2, 4, and 10 belonged to the Sri Prasanna Venkatesa Perumal Temple. Items 3, 5, 6, 7, 8, 9, 11 and 12 belonged to the Sabha. Items 13 to 32 in the return, dated 28th February, 1972 belonged to the Kattalais. Subsequently, in response to notice received under section 11 (1) of the

Act, the then Secretary of the Sabha appeared before the Assistant Commissioner, Urban Land Tax, Madurai through an advocate. It was pleaded before the second respondent that while assessing the properties to Urban Land Tax, items 13 to 32 in the return cannot be clubbed together for the purpose of arriving at the rate of Urban Land Tax. This contention was advanced on the basis that each of the kattalais is the separate owner of its own property. The Sabha must be deemed to be only a trustee in respect of each of the kattalais. Consequently, it would not be open to the Assistant Commissioner to treat the Sabha as the owner of the Kattalai properties, namely, items 13 to 32 and levy urban land tax on that basis.

4. By his order, dated 15th November, 1973, which order is challenged in these proceedings, the second respondent rejected the contention of the petitioner and treated the Kattalai properties as the properties of the Sabha and determined the rate of tax payable accordingly. Aggrieved by the said order of the second respondent, the Sabha preferred U.L.T.A. No. 142 of 1974 before the statutory Appellate Authority, the Special Tribunal for Urban Land Tax Appeal, Madurai. The Sabha had preferred two other appeals, U.L.T.A. Nos. 375 of 1973 and 72 of 1976. The appeals were heard together. The first respondent by a common order, dated 24th September, 1976, set aside the valuations fixed by the Assistant Commissioner, namely the second respondent, for certain irregularities apparent on the face of the order and remanded the matter for disposal on certain limited points. But the Special Tribunal, however, rejected the contention advanced on the side of the Sabha that items 13 to 32 which are Kattalai properties in the hands of the Sabha should not be clubbed together for the purpose of determining the rate of tax. Consequently, the Sabha has filed this writ petition. As already stated, the compass of this writ petition is confined only to the contention which was not upheld by the respondents, namely, items 13 to 32 included in the return, dated 28th February, 1972, which are admitted kattalai properties in the hands of the Sabha should not be clubbed together for the purpose of determining the rate of urban land tax.

5. There is no discussion about this question in the order of the second respondent. Presumably it does not appear to have been raised so specifically before the second respondent. However, the point No. 2 was raised specifically before the Special Tribunal, namely, whether the claim for separate assessment could be sustained. The Special Tribunal took the view that under the trust deed the settlors had completely settled the properties for implementing the objects described in the deed and there is a complete cessation of ownership on the part of the founder by vesting the properties in the Sabha. In the language of the Special Tribunal, it is difficult to maintain the claim of the Sabha in the face of the manifest terms of the deeds which unmistakably pointed out that the corpus itself had been dedicated to the Sabha for the object described in the deeds.

6. Mr. O. V. Baluswami with his characteristic precision points out that on the face of it the reasoning of the Special Tribunal cannot stand scrutiny in the eye of law. The learned counsel points out that the endowment is in favour of the Kattalai which is entitled to hold the properties. The endowment is for the purpose of performance of certain religious charities. The Sabha is only the human agency or the ministrant through which the aims and objects of the kattalai are to be carried out. In this connection, the learned counsel drew my attention to the leading case reported in *Sri Vidya Varuthi Thirtha Swamigal* v. *Baluswami Ayyar and others*[1], where the legal position of a trustee understood in Hindu Law has been laid down by the Privy Council. It will suffice to quote the head-note which is to the following effect:

> "It is to be remembered that a 'trust' in the sense in which the expression is used in English Law, is unknown in the Hindu system, pure and simple, J. C. Ghosh 'Hindu Law', 276. Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious; in the

1. (1921) 48 I.A. 302: I.L.R. 44 Mad. 831: 41 M.L.J. 346: 15 L.W. 78: A.I.R. 1922 P.C. 123 (P.C.).

Hindu social and religious system; to Brahmins, *Goswamis*, *Sanyasis*, etc. Under the Hindu Law, the image of a deity of the Hindu pantheon is, as has been aptly called, a 'juristic entity', vested with the capacity of receiving gifts and holding property. When the gift is directly to an idol or a temple, the seizin to complete the gift is necessarity effected by human agency. Called by whatever name he is only the manager and custodian of the idol or the institution. In no case is the property conveyed to or vested in him; nor is he a 'trustee' in the English sense of the term, although in view of the obligations and duties vesting in him, is answerable as a trustee in the general sense for maladministration. The Law of Trusts owes its origin to a rule laid down by the Prophet of Islam, and means, 'the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings'."

Drawing inspiration from this decision, the learned counsel submits that the view of the Special Tribunal that the property is absolutely vested in the Sabha is erroneous. Therefore, argued the learned counsel, the Sabha must be considered to be a trustee in respect of as many kattalais as there are created by documents. If this position is conceded, the properties of one kattalai in the hands of the Sabha as its trustee or manager cannot be tacked on together with the properties of another kattalai, merely because the trustee or manager of both the Kattalais happens to be the same individual and the same institution, namely the Sabha.

7. The learned counsel is perfectly right in his submission. Section 6 (17) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 defines a religious endowment or endowment as:

" 'Religious endowment' or 'endowment' means all property belonging to or given or endowed for the support of Maths or temples, or given or endowed for the performance of any charity of a public nature connected therewith or of any other religious charity; and includes the institution concerned and also the premises thereof; but does not include gifts of property made as personal gifts to the archaka, service-holder or other employee of a religious institution."

Section 6 (19) defines a specific endowment as:

"any property or money endowed for the performance of any specific service or charity in a math or temple, or for the performance of any other religious charity, but does not include an inam of the nature described in *Explanation* (1) to clause (17)."

Section 6 (18) defines a 'religious institution' as meaning a math, temple or specified endowment, and section 6 (22) defines a 'trustee' thus:

" 'trustee' means any person or body by whatever designation known in whom or in which the administration of a religious institution is vested, and includes any person or body who or which is liable as if such person or body were a trustee."

This is only a codification of the general law of religious endowments to the extent it defined a trustee as well as religious institution. From this it is clear that a trustee is only a person in whom the administration of a particular religious institution or a special endowment vests. It is not correct to call a trustee as the owner of the property.

8. What exactly is the nature of a Kattalai came up for consideration recently before a Bench of this Court in *R. M. AR. AR. RM. AR. Ramanathan Chettiar* v. *Commissioner for Hindu Religious and Charitable Endowment, Madras*[1], Ratnavel Pandian, J., in disposing of A.S. Nos. 341 of 1972 and 378 of 1974 has observed as follows:

"As laid down in *President, Board of Commissioners for Hindu Religious Endowments* v. *Nagarathina Mudaliar*[2], a kattalai is a religious endowment within the meaning of section 9 (11) of the 1927 Act.

1. (1978) 91 L.W. 237.
2. (1935) 68 M.L.J. 549: 41 L.W. 454: A.I.R. 1935 Mad. 417.

Similarly, another Bench of this Court, consisting of Ramesam, O.C.J., and Venkatasubba Rao, J. in *Vaidyalinga Pandara Sannadhi* v. *Ramalinga Mudaliar*[1] took such a view. In a separate judgment, Ramtsam, O.C.J., held that the word kattalai' wts used in two senses. In the strict sense it was a religious endowment, the subject in which is the performance of such kind of religious duty in the temple for the spiritual benefit of some other individual. In the lesser sense, the temple itself was the beneficiary and the Kattalais are only a number of separate trusts. If the kattalai in question was a kattalai in the strict sense, the suit would not be maintainable......"

Therefore, from this also it is clear that each one of the kattalais is a separate specific endowment and in respect of each of the kattalais, the Sabha stands in the position of a trustee or the manager. When once this position is accepted, the Sabha must be deemed to be holding as trustee separately and distinctly, the properties of each of the kattalais.

9. Section 5 of Act XII of 1966 is the charging section which reads—

"Subject to the other provisions contained in this Act, there shall be levied and collected for every fasli year commencing from the date of the commencement of this Act, a tax on each urban land (hereinafter referred to as the Urban Land Tax) from the owner of such urban land at the rate of 0.4 per centum of the market value of such urban land."

10. "Owner" is defined in section 2 (10) thus:

" 'owner' includes—

(*i*) any person including a mortgagee in possession for the time being receiving or entitled to receive, whether on his own account or as agent, trustee, guardian, manager or receiver for another person or for any religious or charitable purpose, the rent or profits of the urban land or of the building constructed on the urban land in respect of which the word is used;

(*ii*) ...."

1. (1934) 39 L.W. 205: 66 M.L.J. 98: I.L.R. 57 Mad. 362: A.I.R. 1934 Mad. 126.

11. Considering sections 5 and 2 (10), the person in whose hands the Urban Land can be charged to Urban Land Tax is the owner. The owner in the case of a religious or charitable institution must necessarily be a trustee thereof. But, when the same person is a trustee for different religious or charitable endowments, it cannot be said that he will be the owner in respect of the urban land owned by all the endowments together. It can only mean that he will be the owner in respect of a land owned by the particular religious endowment. Viewed in this sense, the Sabha cannot be deemed to be the owner of all the properties of the various kattalais clubbed together. It must be considered to be the owner in respect of the urban land owned by each of the kattalais and it will be liable to be taxed separately on the urban land owned by each of the kattalais.

12. Merely because the Sabha manages the properties of the various Kattalais, all the properties cannot be clubbed together in its hands and assessed as such to Urban Land Tax. A similar situation arose under the Madras Agricultural Income-tax Act, 1955 for consideration by a Bench of this Court in *State of Madras* v. *Pattammal*[1]. A person owning extensive properties executed five settlements settling different properties on five different persons. Even after the settlement all the lands continued to be managed and cultivated as usual with the same agents by the settlor, some lands under pannai cultivation and some on waram. The waram was received in common from all the lands and the income was pooled together and brought to a common day-book and ledger. It was not possible to find out from the accounts the income from the lands given to each of the beneficiaries. All the income arising as per the account books was deposited in a bank in the joint names of the settlor and another person as the trustees fod the beneficiaries

1. (1966) 62 I.T.R. 485.

or deposited in a bank in the names of trustees. From these circumstances, the Assessing Officer as well as the Assistant Commissioner of Agricultural income-tax came to the conclusion that the several beneficiaries under the five documents were liable to be assessed as an association of individuals on their agricultural income. In the opinion of the Tribunal, there was nothing to show that the documents were not genuine or that they had not been acted upon and the Tribunal held that there could not be any inference about an association of individuals through the mere fact of common management, that the documentary evidence showed that the settlements enured to the benefit of the beneficiaries inescapably and there was nothing to show that the beneficiaries engaged themselves in a joint enterprise for the purpose of producing income for the lands; and that the beneficiaries could not be assessed as an association of individuals. It was held:

> "The fact that different owners of properties, for their own convenience, secured the help of the same person for looking after their lands and cultivating them would not *ipso facto* constitute them as an association of individuals within the special meaning given to that term for the purpose of assessment under the Agricultural Income-tax Act, and, on the facts, the Tribunal was right in holding that the beneficiaries could not be assessed as 'an association of individuals'."

Though the aforesaid case, on its facts as well as the statutory provision which it contained, may not be strictly applicable to the present case on all fours, the principle is applicable, namely merely because the Sabha happens to manage the urban land belonging to various kattalais, it cannot be held that the Sabha is the owner of all the properties of the kattalais put together.

13. One other case referred to by Mr. O. V. Baluswami is the one reported in *Mariam Aysha* v. *Commissioner of Agricultural Income-tax*[1]. That also arose under the Madras Agricultural Income-tax Act, 1955. The assessee, after settlement of certain properties on her and her minor children by her husband filed separate applications for composition in respect of lands held by her as well as her minor children. But the Officer clubbed all the lands into one unit and passed a consolidated order purporting to act on the consent therefor, given by the petitioner's husband. This was confirmed in revision by the Commissioner. She filed a writ petition in this Court seeking to quash the order of the Commissioner. Ramaprasada Rao, J., as he then was, allowed the writ petition holding that the clubbing by the authorities below which was accepted by the Commissioner was against law and not justified. The learned Judge observed thus:

> "The process of reckoning the tax is prescribed under the Act. No doubt, a person has been defined as an individual or association of individuals, owning or holding property for himself or for any other or partly for his own benefit and partly for another, either as owner, trustee, receiver, common manager, administrator, executor in any capacity recognised by law, and...... But the point is whether such a person holds the land in question as an owner or in any other capacity which is otherwise than, individualistic. If a person satisfies the characteristics of an owner and that of a trustee, receiver, etc......, then he would be fulfilling a double capacity and effectively he would be considered as indicating a dual personality in him. In a case where such a dual personality is projected, section 8 enjoins the revenue to levy such tax upon such an individual in his capacity as receiver, administrator, executor, trustee, etc. Thus, therefore, if there is dual personalty in one individual or person and if such a person holds, then a severability is contemplated if such a person holding such a dual personality comes up with an application for composition. The lands held by him in his capacity as a normal person would be severed from the lands held by him in his capacity as receiver, administrator, etc., and would be dealt with accordingly. I am only illustrating this for the purpose of pointing out that the Assessing Officer normally has no jurisdiction to club holdings of persons who

1. (1976) 104 I.T.R. 381.

have a different status in the eye of law and who fill in different legal personalities in any one individual."

The same principle applies to the facts of this case. The Sabha fills the capacity of as many trustees there ahe kattalais. Therefore, the lands of all the kattalais cannot be clubbed together and assessed to urban land tax as one unit.

14. I therefore, allow this writ petition and quash the order of the Special Tribunal which in turn confirmed the order of the Assistant Commissioner to the extent that the Tribunal has found that the second respondent can club together the properties of the various Kattalais which are itemised as items 13 to 32 in the return, dated 28th February, 1972. I further direct that the second respondent will treat the lands of each kattalai of which the Sabha is a trustee severally and distinctly and proceed to assess the same on that basis. As already referred to by me, the matter has been remanded to the second respondent by the Special Tribunal to determine the market value of the land. I therefore remit the entire matter for consideration to the second respondent, who will proceed to pass a fresh assessment order in the light of the directions contained herein. It is needless to add that the basis referred to here, namely that the lands of each of the Kattalais should be severally and distinctly treated, applies to all future assessments also. There will be no order as to costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

M. K. M. Mohammed Abu Bucker and others .. *Appellants**

v.

Hindustan Petroleum Corporation Ltd. .. *Respondent.*

Madras City Tenant's Protection Act (III of 1922), sections 1 (3), 2 (3) — Suit for recovery of possession of suit properties and for arrears of rent — Suit properties in Tirunelveli — Act extended to Tirunelveli Municipal Town by G.O. No. 533, Revenue, dated 15th October, 1956 with effect from 31st October, 1956—Lease deed Exhibit B-14, expired on 31st March, 1958 and Exhibit A-3, dated 6th July, 1959, commenced on 1st April, 1959 — Act applied to leases created before 31st October, 1956—No evidence to establish the continuation of lease from Exhibit B-14 to Exhibit A-3—Tenant held not entitled to the benefits of the City Tenants' Protection Act.

The plaintiff filed a suit for recovery of possession of the suit properties and for arrears of rent. Four lease deeds were produced. Exhibit B-13, dated 3rd July, 1944 commenced the lease on 1st April, 1944 and was to enure for a period of seven years. Exhibit B-14 was dated 15th March, 1951 and the lease commenced on 1st April, 1951 for a period of seven years. The next lease deed was Exhibit A-3, dated 6th July, 1959 and the lease commenced on 1st April, 1959 for a period of ten years with an option to extend the lease for a further period of 10 years. Thus there was a gop of one year in between the termination of the lease under Exhibit B-14 and the commencement of the lease under Exhibit A-3. The suit properties were situated in Tirunelveli Municipal Town. The City Tenants Protection Act was extended to that area by a notification under G.O. No. 533, Revenue, dated 15th October, 1956

* S.A. No. 2359 of 1975. 3rd April, 1979.

and the Act was applicable with effect from 31st October, 1956 and the Act applied to tenancies created before that date. In this case the tenant claimed the benefits under the City Tenants' Protection Act.

Held, with reference to the notification published in October, 1956, the same had no application to the tenancy in question, because the tenancy in the present case came into existence only with effect from 1st April, 1959 under Exhibit A-3, dated 6th July, 1959 and there being no evidence to establish that the tenancy brought about under Exhibit A-3 was a continuation or renewal of the tenancy which came into existence on or before 31st October, 1956, the respondent herein would not be entitled to claim the benefit of the City Tenants' Protection Act. [*Para*. 2.]

The crucial date for the purpose is 31st October, 1956 and not 14th September, 1966, when G.O. Ms. No. 2769, Revenue, dated 6th September was published in the Gazette being a notification under section 2 (1) (*i*).

The City Tenants' Protection Act contemplates the Government issuing two different types of notifications — one under section 2 (3) extending the Act itself to tenancies in a particular area, the second in relation to the definition of the term 'building' in section 2 (1). Section 2 (1) defines 'building' and clause (*i*) relates to the user of the premises "for residential or non-residential purposes" and clause (*ii*) to the user "for residential purposes only". Clause (*i*) refers, apart from City of Madras etc., to "such other municipal areas as the Government may by notification specify". It is with reference to this power that G.O. Ms. No. 2769, Revenue, dated 6th September, 1966, was published in the Government Gazette dated 14th September, 1966. What is relevant is the applicability of the Act to the tenancy and not whether the premises in question fall within the scope of the definition of the term "building" in section 2 (1) (*i*) or not. As far as the applicability of the Act to the tenancy is concerned the relevant notification is that which was published in October, 1950 and not the notification published in September, 1966. [*Para*. 2.]

Appeal against the decree, dated 23rd December, 1971 of the Principal Subordinate Judge, Tirunelveli (A.S. No. 294 of 1971, District Court, Tirunelveli) in Appeal Suit No. 87 of 1971, preferred against the decree, dated 28th June, 1971 of the Court of the Principal District Munsiff, Tirunelveli in Original Suit No. 399 of 1969.

M. Srinivasan and *S. Desikan*, for Appellants.

P. J. George, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiffs in O.S. No. 399 of 1969 on the file of the Court of the District Munsif of Tirunelveli, who lost before the Court below, are the appellants herein. The suit was one for recovery of possession of the suit properties and for arrears of rent. It is not necessary to refer to the various allegations and counter-allegations made by the parties in their respective pleadings. Admittedly, the suit properties belonged to the appellants-plaintiffs, and equally admittedly they had leased out the suit lands to the respondent-defendant for installing and erecting and maintaining underground tanks, delivery pumps, etc., and putting up necessary structures for the purpose of storing and selling petrol, petroleum products, oils, etc. When the suit was instituted for recovery of possession, the respondent put forward the contention that the respondent is entitled to the benefits of the Madras City Tenants' Protection Act. In the additional written statement filed by the respondent, the respondent claimed that the City Tenants' Protection Act applied and that the suit was not maintainable under section 11 of the said Act. This contention was put forward on the basis that the respondent herein had been continuously a tenant of the premises in question and its occupation was prior to 1944. There was no oral evidence let in either by the parties in the present case, and the suit was disposed of on the basis of the documentary evidence alone. In this case, four leases had been produced. Exhibit B-13 is the earliest lease deed, dated 3rd July, 1944 under which the lease commenced from 1st April, 1944 and was to enure for a period of seven years, the rent being Rs. 180 per annum. The second lease deed is Exhibit B-14. dated 15th March, 1951 and under that document the lease was

to commence from 1st April, 1951 for a period of seven years and the rent was Rs. 325 per annum. The significant thing to be noticed about Exhibits B-13 and B-14 is that Exhibit B-14 had come into existence even before the expiry of the period of lease provided for in Exhibit B-13 and there is continuity of the term, because the lease under Exhibit B-14 has commenced immediately on the expiry of the period under Exhibit B-13. The next lease deed is Exhibit A-3, dated 6th July, 1959. Though this lease deed is dated 6th July, 1959, the deed itself provided that the lease should commence from 1st April, 1959 and the rent shall be Rs. 1,500 payable annually in advance on or before the 5th day of April, and the period of lease was ten years. According to clause 3 (*d*) of this lease deed, the landlord agreed with the tenant that

> "the landlord will on the written request of the tenant made two calendar months before the expiry of the term thereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the tenant hereinbefore contained, grant to it a lease of the demised premises for the further term of ten years from the expiration of the said term at a rent to be decided by mutual consent at the time of renewal and containing the like covenants and provisos as are herein contained."

The respondent herein claims to have exercised the right under clause (*d*) for the renewal of the lease for a period of 10 years and it is not necessary to consider the correctness or otherwise of the stand of the respondent in this behalf in view of the fact that even that period of ten years expired on 31st March, 1979. The significant thing to be noticed as far as Exhibit A-3 is concerned is that though it was entered into on 6th July, 1959, the parties agreed for the commencement of the lease from 1st April, 1959 and in between the termination of the lease under Exhibit B-14, and the commencement of the lease under Exhibit A-3, there was an interval of one year. There is absolutely no evidence to show that during that interval the respondent continued to be a tenant of the premises in question and Exhibit A-3 is only a renewal of the lease starting under Exhibit B-14 which itself was a renewal of the lease provided for under Exhibit B-13. The above question has considerable significance in view of the claim put forward by the respondent that the respondent is entitled to the benefits of the City Tenants' Protection Act. It is not in dispute that the City Tenants' Protection Act was exended to the area in question only by the notification of the Government made under G.O. No. 533, Revenue, dated 15th October, 1956 published in Fort St. George Gazette, Part I, page 1667, under which the Act has been extended to Tirunelveli Municipal Town with effect from 31st October, 1956. Section 1 (3) of the Act provided that the Act shall apply only to tenancies of land created before the date with effect from which the Act shall be extended to particular town or village concerned. In this case, since the Act had been extended to Tirunelveli town only with effect from 31st October, 1956, it would apply only to tenancies created before that date and not later. Here, as I pointed out already, the tenancy was created under Exhibit A-3, though it takes effect with from 1st April, 1959. This is a tenancy created subsequent to 31st October, 1956. The respondent herein would be entitled to succeed in its claim to the benefits under the City Tenants' Protection Act only if the respondent is able to prove that the lease under Exhibit A-3 was in continuation of the tenancy under Exhibit B-14 which commenced from 1st April, 1951. As I pointed out already, there is a gap of one year between the termination of the tenancy under Exhibit B-14 and the commencement of the tenancy under Exhibit A-3 and therefore the tenancy under Exhibit A-3 cannot be said to be a renewal or a continuation of the tenancy under Exhibit B-14.

2. However, learned counsel for the respondent sought to contend that the crucial date for this purpose is 14th September, 1966, on which date G.O. Ms. No. 2769, Revenue, dated 6th September, 1966 was published in the Tamil Nadu Government Gazette, being a notification under section 2 (1) (*i*) of the City Tenants' Protection Act. I am of opinion that this has no relevancy to the controversy between the parties. What is relevant for the decision is the date on

which the Act applied to the tenancy between the appellant and the respondent. The Act contemplates the Government issuing two different types of notifications. One notification is under section 2 (3) of the Act extending the Act itself to tenancies in a particular area. The second notification is in relation to the definitions of the term "building" occurring in section 2 (1) of the Act. Section 2 (1) defines the expression "building" and clause (*i*) relates to the user of the premises "for residential or non-residential purposes", and 'clause (*ii*) to the user for residential purposes only'. Under clause (*i*) after referring to the following areas *viz.*, the City of Madras, and the municipal towns of Coimbatore, Madurai, Salem and Tiruchirapalli, it refers to 'such other municipal town as the Government may, by notification, specify.' It is with reference to this power of the Government mentioned in section 2 (1) of the Act, that the notification, dated 6th September, 1966 was published in the Tamil Nadu Government Gazette, dated 14th September, 1966. As I pointed out already, what, is relevant is the applicability of the Act to the tenancy and not whether the premises in question comes within the scope of the definition of the term "building" in section 2 (1) or not. As far as the applicability of the Act to the tenancy is concerned, the relevant notification is that which was published in October, 1956 and not the notification published in September, 1966. With reference to the notification published in October, 1956, as I pointed out already, the same has no application to the tenancy in question, because the tenancy in the present case came into existence only with effect from 1st April, 1959 under Exhibit A-3, dated 6th July, 1959 and there being no evidence to establish that the tenancy brought about under Exhibit A-3 is a continuation or renewal of the tenancy which came into existence on or before 31st October, 1956 the respondent herein would not be entitled to claim the benefit of the City Tenants' Protection Act.

3. Under these circumstances, the second appeal is allowed and the judgments and decrees of the Courts below are set aside and the suit instituted by the appellants herein will stand decreed as prayed for. No order as to costs.

S.J. —— *Appeal allowed.*

[END OF VOLUME (1979) 2 M. L. J. (REPORTS).]

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The Madras Law Journal

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :— *V.R. Krishna Iyer, D.A. Desai, and A.P. Sen, JJ.*

V.C. Rangadurai .. *Appellant**

v.

D. Gopalan and others .. *Respondents.*

(A) *Advocates Act (XXV of* 1961), *section* 38—*Appeal under—Interference with concurrent finding by Supreme Court—Practice.*

In an appeal under section 38 of the Advocates Act, the Supreme Court, would not, as a general rule, interfere with the concurrent finding of fact by the Disciplinary Committee of the Bar Council of India and of the State Bar Council unless the finding is based on no evidence or it proceeds on mere conjecture and unwarranted inferences. This is not the case in the present case. [*Para.* 27.]

When a lawyer has been tried by his peers there is no reason for the Supreme Court to interfere in appeal with the finding in such a domestic enquiry merely because on a re-appraisal of the evidence a different view is possible. [*Para.* 29.]

(B) *Advocates Act (XXV of* 1961), *section* 35—*Disciplinary proceedings under—Nature and purpose of—Extent of proof required.*

Under the scheme of the Advocates Act the disciplinary jurisdiction vests with the State Bar Council and the Bar Council of India. Disciplinary proceedings before the State Bar Council are *sui generis*, are neither civil nor criminal in character and are not subject to the ordinary criminal procedural safeguards. The purpose of disciplinary proceedings is not punitive but to inquire, for the protection of the public, the Courts and the legal profession, into fitness of the subject to continue in the capacity of an advocate Findings in disciplinary proceedings mun be sustained by a higher degree of proof that. that required in civil suits, yet falling short of the proof required to sustain a conviction in a criminal prosecution. There should be convincing preponderance of evidence. [*Para.* 28.]

(C) *Advocates Act (XXV of* 1961), *section* 35—*Legal profession —Professional etiquette—Duty of advocate when conflict of interest exists.*

It is not in accordance with professional etiquette for one advocate to hand over his brief to another to take his place at a hearing (either for the whole or part of the hearing) and conduct the case as if the latter had himself been briefed, unless the client consents to this course being taken. Counsel's paramount duty is to the client; accordingly where he forms an opinion that a conflict of interest exists, his duty is to advise the client that he should engage some other lawyer. It is unprofessional to represent conflicting interests, except by express consent given by all concerned after a full disclosure of the facts. [*Para.* 30.]

Nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession. A lawyer when entrusted with a brief, is expected to follow the norms of professional ethics and try to protect the interest of his clients, in relation to whom he occupies a position of trust. [*Para.* 31]

(D) *Advocates Act (XXV of* 1961), *section* 35—*Advocate charged with misappropriation of funds of client—Restitution to or settlement with client—If mitigates offence.*

Where it is shown that the advocate acted in bad faith towards his client in detaining or misappropriating funds of the client, or that the wrong was committed or aided by means of false representation, fraud or deceit, as here, the fact that the advocate makes restitution

* C.A.No. 839 of 1978. *4th October,* 1978.

to or settlement with the client will not prevent disbarment, especially where restitution was not made until after the commencement of the disciplinary proceedings. It is only an ameliorating circumstance but does not mitigate the offence involved in the misappropriation, particularly when the repayment is made under pressure. [*Para.* 36.]

(E) *Advocates Act* (*XXV of* 1961), *sections* 35, 37,38 -*Advocate found guilty of professional misconduct—Award of proper punishment—Powers of Court—Suspension with a provision for reduction on an undertaking to serve the poor—Legality.*

Per Majority (Krishna Iyer and Desai, JJ.) Section 35 (3) of the Advocates Act has a mechanistic texture, a set of punitive pigeon-holes but it should be noted that words grow in content with time and circumstances, that phrases are flexible in semantics, that the printed text is a set of vessels into which the Court may pour appropriate judicial meaning. Hence, quarrying more meaning is permissible out of section 35 (3) and the appeal provisions, in the brooding background of social justice, sanctified by Article 38 and of free legal aid enshrined by Article 39-A of the Constitution. [*Para.* 8.]

Section 35 (3) (*c*) enables suspension of the advocate—whether conditionally or absolutely, it is left unclear. Section 37 (2) empowers the Bar Council of India widely to pass such order as it deems fit. And the Supreme Court enjoys, under section 38, ample and flexible powers to pass such order as it deems fit. Wide as the power may be, the order must be germane to the Act and its purposes and latitude cannot transcend those limits. [*Paras.* 10, 11.]

The Court sought to adopt the punishment of suspension to serve two purposes--injury and expiation. The ends of justice would be best served in the present case by directing suspension plus a provision for reduction on an undertaking to the Court to serve the poor for a year. Both are orders within the Supreme Court's power. [*Para* 9.]

Per Sen, J. (*dissenting*): When there is disbarment or suspension from practice, the lawyer must prove, if he can, after the expiration of a reasonable length of time, that he appreciates the significance of his dereliction, that he has lived a consistent life of probity and integrity and that he possesses the good character necessary to guarantee uprightness and honour in his professional dealings and therefore is worthy to be restored. The burden is on the applicant to establish that he is entitled to resume the privilege of practising law without restrictions. [*Para.* 37

It is also doubtful whether a direction can be made requiring the advocate to undertake free legal aid during the period of his suspension. This would be a contradiction in terms. Under section 35 (4), when an advocate is suspended from practice he shall during the period of suspension, be debarred from practising in any Court or before any authority or person in India. If the making of such a direction implies the termination of the order of suspension, on the fulfilment of the conditions laid down, no restriction on the right of the advocate to appear before any Court or authority, which privilege he enjoys under section 30 of the Act can be imposed. [*Para.* 39

The Court delivered the following judgment

Krishna Iyer, J. (on behalf of himself and *D.A. Desai, J.*)—We agree wholly with our learned brother Sen, J., that the appellant is guilty of gross professional misconduct and deserves condign punishment. But conventional penalties have their punitive limitations and flaws, viewed from the reformatory angle. A therapautic touch, a correctional twist, and a locus penitentiae, may have rehabilitative impact, if only we may experiment unorthodoxly but within the parameters of the law. Oriented on this approach and adopting the finding of guilt, we proceed to consider the penalty, assuming the need for innovation and departing from wooden traditionalism.

2. A middle-aged man, advocate by profession, has grossly misconducted himself and deceived a common client. Going by precedent, the suspension from practice for one year was none too harsh. Sharp practice by members of noble professions deserves even disbarment. The wages of sin is death.

3. Even so, justice has a correctional edge, a socially useful function, especially when the delinquent is too old to be pardoned and too young to be disbarred. Therefore, a curative, not cruel punishment has to be designed in the social setting of the legal profession.

4. Law is a noble profession, true; but it is also an elitist profession. Its ethics, in practice, (not in theory, though) leave much to be desired, if viewed as a profession *for the people.* When the Constitution under Article 19 enables professional expertise to enjoy a privilege and the Advocates Act confers a monopoly, the goal is not assured income but commitment to the people—the common people whose hunger, privation and hamstrung human rights need the advocacy of the profession to change the existing order into a Human Tomorrow. This desideratum gives the clue to the direction of the penance of a deviant geared to correction. Serve the people free and expiate your sin, is the hint.

5. Law's nobility as a profession lasts only so long as the members maintain their commitment to integrity and service to the community. Indeed, the monopoly conferred on the legal profession by Parliament is coupled with a responsibility—a responsibility towards the people, especially the poor. Viewed from this angle, every delinquent who deceives his common client deserves to be frowned upon. This approach makes it a reproach to reduce the punishment, as pleaded by learned counsel for the appellant.

6. But, as we have explained at the start, every punishment, however, has a functional duality—deterrence and correction. Punishment for professional misconduct is no exception to this 'social justice' test. In the present case, therefore, from the punitive angle, the deterrent component persuades us not to interfere with the suspension from practice reduced 'benignly' at the appellate level to one year. From the correctional angle, a gesture from the Court may encourage the appellant to turn a new page. He is not too old to mend his ways. He has suffered a litigative ordeal, but more importantly he has a career ahead. To give him an opportunity to rehabilitate himself by changing his ways, resisting temptations and atoning for the serious delinquency, by a more zealous devotion to people's caues like legal aid to the poor, may be a step in the correctional direction.

7. Can these goals be accommodated within the scheme of the statute? Benignancy beyond the bounds of law are not for judges to try.

8. Speaking frankly, section 35(3) has a mechanistic texture, a set of punitive pigeonholes, but we may note that words grew in content with time and circumstance, that phrases are flexible in semantics, that the printed text is a set of vessels into which the Court may pour appropriate judicial meaning. That statute is sick which is allergic to change in sense which the times demand and the text does not countermand. That Court is superficial which stops with the cognitive and declines the creative function of construction. So, we take the view that 'quarrying more meaning is permissible out of section 35(3) and the appeal provisions, in the brooding background of social justice, sanctified by Article 38 and of free legal aid enshrined by Article 39-A of the Constitution. "A statute rarely stands alone, Back of Minerva was the brain of Jove, and behind Venus was the spume of the ocean."

(The Interpretation and Application of Statutes —Read Dickerson p. 103).

9. Back to the Act. Section 35 (3) reads:

"The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely :—

(*a*) dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;

(*b*) reprimand the advocate;

(*c*) suspend the advocate from practice for such period as it may deem fit;

(*d*) remove the name of the advocate from the State roll of advocates."

Section 37 provides an appeal to the Bar Council of India. It runs:

"37 (1). Any person aggrieved by an order of the disciplinary committee of a State (or the Advocate-General of the State) may, within sixty days of the date of the communication of the order to him, prefer an appeal to the Bar Council of India.

(2) Every such appeal shall be heard by the disciplinary committee of the Bar Council of India which may pass *such order* (including an order varying the punishment awarded by the disciplinary committee of the State Bar Council) thereon *as it deems fit.*"

Section 38 provides a further, final appeal to the Supreme Court in these terms;

"Any person aggrieved by an order made by the disciplinary committee of the Bar Council of India under section 36 or section 37 (or the Attorney-General of India or the Advocate-General of the State concerned, as the case may be) may, within sixty days of the date on which the order is communicated to him, prefer an appeal to the Supreme Court and the Supreme Court may pass *such order* (including an order varying the punishment awarded by the disciplinary committee of the Bar Council of India) thereon *as it deems fit*[1]."

10. Section 35(3)(*c*) enables suspension of the advocate—whether conditionally or absolutely, it is left unclear. Section 37(2) empowers the Bar Council of India widely to 'pass such order..........*as it deems fit*.' And the Supreme Court, under section 38 enjoys ample and flexible powers to 'pass such order........*as it deems fit*.'

11. Wide as the power may be, the order must be germane to the Act and its purposes, and latitude cannot transcend those limits. Judicial 'Legisputation', to borrow a telling phrase of J. Cohen[1], is not legislation but application of a given legislation to new or unforeseen needs and situations broadly falling within the statutory provision. In that sense, 'interpretation is inescapably a kind of legislation'.[2] This is not legislation *stricto sensu* but application, and is within the Court's province.

12. We have therefore sought to adapt the punishment of suspension to serve two purposes—injury and expiation. We think the ends of justice will be served best in this case by directing suspension plus a provision for reduction on an undertaking to this Court to serve the poor for a year. Both are orders within this Court's power.

13. Tamil Nadu has a well-run free legal aid programme with which the Governor and Chief Justice of the State are associated. The State Legal Aid Board, working actively with two retired Judges of the High Court at the head, may use the services of the appellant keeping a close watch on his work and relations with poor clients, if he applies to the Legal Aid Board for giving him such an opportunity, after getting this Court's order as provided below. Independently of that, as a token of our inclination to allow the appellant to become people-minded in his profession, we reduce the suspension from practice upto the *14th of August*, 1979. With the next Independence Day we hope the appellant will inaugurate a better career and slough off old bad habits. If the appellant gives an undertaking that he will work under any official legal aid body in Tamil Nadu and convinces the Chairman of the State Legal Aid Board, Tamil Nadu, to accept his services in any specific place where currently there is an on-going project, produces a certificate in this behalf from the Board, and gives an undertaking to this Court that he will do only free legal aid for the year as reasonably directed by the Board (and shall not during that period accept any private engagement), his period of suspension shall stand terminated with effect from 26th January, 1979. As a condition precedent to his moving this Court he must pay (and produce a receipt) Rs. 2,500 to the victim of the misconduct. Atonement cannot be by mere paper pledges but by actual service to the people and reparation for the victim. That is why we make this departure in the punitive part of our order.

14. Innovation within the framework of the law is of the essence of the evolutionary process of juridical development. From that angle, we think it proper to make a correctional experiment as a super-addition to punitive infliction. Therefore, we make it clear that our action is less a precedent than a portent.

15. With the modification made above, we dismiss the appeal.

Sen, J.—This appeal under section 38 of the Advocates Act, 1961 by V.C. Rangadurai is directed against an order of the Disciplinary Committee of the Bar Council of India dated 11th March, 1978, upholding the order of the Disciplinary Committee-II of the State Bar Council, Madras dated 4th May, 1975, holding him guilty of professional misconduct but reducing the period of suspension from practice to one year from six years.

17. There can be no doubt that the appellant had duped the complainants, T. Deivasenapathy, an old deaf man aged 70 years and his aged wife Smt. D. Kamaammal by not filing the suits on two promissory

1. The Advocates Act (XXV of 1961), pp. 20 and 21.

2. The Interpretation and Application of Statutes, Read Dickerson, p. 238.

notes for Rs. 15,000 and Rs. 5,000 both dated 26th August, 1969 executed by their land-lady Smt. Parvathi Ammal, who had borrowed Rs. 20,000 from them, by deposit of title deeds.

18. Admittedly, though the plaint for recovery of the amount due on the promissory note for Rs. 15,000 with interest thereon bearing Court-fee of Rs. 1,519.25 was returned for presentation to the proper Court, it was never re-presented. It is also not denied that though the appellant had drafted the plaint for recovery of Rs. 5,000 with interest, no such suit was ever filed. In spite of this, the appellant made false representations to the complainants Deivasenapathy (P.W. 1), his wife Smt. Kamalammal (P.W.3) and the power of attorney agent of the complainants, D. Gopalan (P.W.2) that the suits had been filed and were pending, gave them the various dates fixed in these two suits, and later on falsely told them that the Court had passed decrees on the basis of the two promissory notes. On the faith of such representations, the complainants served a lawyer's notice dated 29th December, 1973 (Ext. P-3) on the debtor Smt. Maragathammal, sister and co-widow to the effect :

> "That you are aware of my client's filing two suits against you for recovery of Rs.15,000 and Rs.5,000 with due interest and costs thereon and it is needless to state that both the suits were decreed as prayed for by my clients in the Court proceedings.
>
> My clients further say that in spite of the fact that the suits had been decreed long ago you have not chosen to pay the amount due under the decrees in question and on the other hand trying to sell the property by falsely representing that the original documents have been lost to the prospective buyers. My clients further state that you are aware of the fact that my clients are in possession of the original documents relating to the property bearing door No.41, Shaik Daood Street, Royapetta, Madras-14, but deliberately made false representation as aforesaid with the *mala fide* intention to defeat and defraud my clients' amounts due under the decree.
>
> My clients emphatically state that you cannot sell the property in question without disclosing the amounts due to them...."

It would thus appear that acting on the representations made by the appellant, the complainants called upon the debtor Smt. Margathammal to pay the amount due under the decrees failing which they had instructed their lawyer to bring the property to sale. Actually no such suits had in fact been filed nor any decrees passed.

19. It is argued that the finding as to professional misconduct on the part of the appellant reached by the Disciplinary Committee of the Bar Council of India is not based on any legal evidence but proceeds on mere conjectures. It is pointed out that the ultimate conclusion of the Disciplinary Committee cannot be reconciled with its earlier observation that it was not prepared to attach any credence to the conflicting assertions of Deivasenapathy that he had at first handed over Rs 855 on 2nd December, 1970 for filing the suit on the promissory note for Rs. 5,000 and then paid Rs. 2,555 sometime in July, 1972 for filing the suit on the promissory note for Rs. 15,000 which is in conflict with the allegation in the lawyer's notice dated 21st February, 1974 (Ext R-1) that a sum of Rs. 3,410 was paid on 17th July, 1972 towards court-fees and expenses for the filing of the two suits, or that the various dates marked in the copies of the two plaints, Ext. P-1 and Ext. P-2, were indeed given by him. It is urged that the Disciplinary Committee was largely influenced by the fact that the appellant gave the receipt, Ext. R-7 to K.S. Lakshmi Kumaran, which was found to be forged. In view of the discrepancies in the testimony of Deivasenapathy, P.W.1, Smt. Kamalammal, P.W.-3 and their agent, D. Gopalan, P.W.2., it was evident that the Disciplinary Committee mainly based the charge of misconduct on mere suspicion. Lastly, it is said that the complaint was a false one and an attempt to pressurize the appellant to persuade his client Smt. Maragathammal to sell the house to the complainants. We are afraid, the contentions cannot be accepted.

20. In denial of the charge the appellant pleaded that though he had drafted the plaint in the suit to be filed on the basis of the promissory note for Rs.5,000 he felt that as the debtor Smt. Maragathammal had consulted him in another matter, it would be better that the complainants engaged some other counsel and he advised them accordingly. He suggested the names of two or three lawyers out of whom, the complainants engaged K. S. Lakshmi Kumaran. He denied that the two promissory notes were handed over to him or that he had

received any amount by way of court-fees or towards his fees. According to him, K.S. Lakshmi Kumaran was, therefore, instructed to file the suits.

21. K.S. Lakshmi Kumaran, on the other hand, pleaded that he knew nothing about the suits but had in fact signed the Vakalat as a junior counsel, as a matter of courtesy at the behest of the appellant. He pleaded that he had never met the complainants nor had he been instructed by them to file the suits. He further pleaded that when the complainants served him with their lawyer's notice dated 11th February, 1974 Ext. R-11, he went and saw the appellant who told him that he had returned the plaint, which was returned by the Court, together with all the documents to the complainant Deivasenapathy as per receipt, Ext. R-7. On 21st February, 1974 the complainants served another lawyer's notice on both the appellant and K S Lakshmi Kumaran. The appellant and K.S. Lakshmi Kumaran sent their replies to this notice. The appellant's reply R-2, was practically his defence in the present proceedings. K.S. Lakshmi Kumaran in his reply, Ext. R-5, refers to the Lawyer's notice, Ext. R-11, sent by the complainants earlier and states that when he took the notice to the appellant, he told him that the papers were taken back from him by the complainant Deivasenapathy who had passed on to him a receipt.

22. The Disciplinary Committee, in its carefully written order, has marshalled the entire evidence in the light of the probabilities and accepted the version of K.S.Lakshmi Kumaran to be true. It observes :-

> "Earlier we referred to the conflict between the two advocates. We cannot help observing that we feel there is want of candour and frankness on the part of R.D. On a careful consideration of the evidence we see no reason to reject the evidence of L that he merely signed the Vakalat and plaint and when the plaint was returned he took the return and passsed on the papers to R.D."

It then concludes stating :

> "On an overall view of the evidence we hold that L was not directly engaged by the parties and that when the plaint with its annexure was returned, L passed it on to R.D. We also accept L's evidence that when on receipt of the notice Ext. R-11 he met R.D. he was informed that the cause papers were taken back by P.W 1 and that some time afterwards R.D. gave him the receipt Ext. R-7.
>
> It must be, that when the complainants turned against R.D. suspecting his *bona fides* he denied having had anything to do in the matter and threw up *sic* his junior colleague in the profession stating that he passed the clients on to L and had nothing more to do with the case. As the clients had no direct contact with L his statement that he handed over the plaint on its return to R.D. looks probable and likely We accept it When a notice was issued to him in the matter he went to RD and RD gave him the receipt Ext. R-7. The receipt purports to be signed by Deivasenapathy and L accepted it for what it was worth."

23. In that view, both advocates were found guilty of professional misconduct, but differing in character and different in content In dealing with the question, it observes:

> "As regards RD, the litigants entrusted the briefs to him whatever their motive. The record does not establish that before entrusting the case to L the complainants were introduced by RD to L and L was accepted by them as counsel in charge of the case."

24. It condemned both the advocates for their dereliction of duty, but only reprimanded K S Lakshmi Kumaran, the junior advocate because he never knew the complainants and had signed the vakalat at the bidding of the appellant, but took a serious view of the misconduct of the appellant and castigated his whole conduct in no uncertain terms, by observing :

> "Finding himself in difficulties RD miserably failed in his duty to his fellow advocate very much junior to him in the profession and who trusted him. The conduct of a lawyer to his brothers in the profession must be characterised by candour and frankness. He must keep faith with fellow members of the bar. While quite properly RD did not accept the engagement himself we are of the view that he has been party to the institution of a suit intended merely to harass the defendants in the suit, with a view to secure some benefit for the other party—manifestly unprofessional."

It went on to observe :

"The only casualty is RD's professional ethics in what he might have thought was a gainful yet good samaritan move. When the move failed and there was no likelihood of his success, the complainants turned against him securing for their help their power of attorney. Then fear—psychosis appears to have set in, leading RD to totally deny his involvement in the plaint that was filed and let down the junior whose assistance he sought. We see no other probability out of the tangled web of exaggerations, downright denials, falsehood and fabrications mingled with some truth."

25. May be, the complainants, were not actuated by a purely altruistic motive in lodging the complaint but that does not exonerate the appellant of his conduct. The suggestion that the complaint was a false one and constituted an attempt at blackmail is not worthy of acceptance. The property was actually sold to M.M. Hanifa for Rs.36,000 by registered sale deed dated 1st August 1974, while the complaint was filed in April 1974. We do not see how the initiation of the proceedings would have pressurised the appellant to compel his client Smt. Maragathammal to part with the property for Rs.20,000 the price offered by the complainants. It is no doubt true that at one stage they were negotiating for the purchase of the house of which they were the tenants but the price offered by them was too low. The Disciplinary Committee of the Bar Council of India summoned the purchaser and he stated that from December, 1973, he had been trying to purchase the property. It is also true that in response to the notice dated 1st August, 1974 served by the purchaser making the complainants to attorn to him, they in their reply dated 8th August, 1974 expressed surprise that he should have purchased the property for Rs.36,000 when in fact it was not worth more than Rs.26,000.

26. It matters little whether the amount of Rs .3,410 was paid to the appellant in a lump sum or in two instalments. Deivasenapathy, P.W. 1 faltered when confronted with the notice Ext. R-1 and the Disciplinary Committee of the Bar Council of India has adversely commented on this by saying that he is not 'an illiterate rustic' but is an M.I.S.E. a retired Civil Engineer. This by itself does not disprove the payment of the amount in question. It may be that the general power of attorney, D. Gopalan, P.W.2 made a mistake in instructing the counsel in giving the notice. As regards the various dates appearing on the copies of the two plaints, Exhibits P-1 and P-2, the complainants could not have got these dates by themselves unless they were given by the appellant.

27. In an appeal under section 38 of the Act, this Court would not, as a general rule, interfere with the concurrent finding of fact by the Disciplinary Committee of the Bar Council of India and of the State Bar Council unless the finding is based on no evidence or it proceeds on mere conjecture and unwarranted inferences. This is not the case here.

28. Under the scheme of the Act, the disciplinary jurisdiction vests with the State Bar Council and the Bar Council of India. Disciplinary proceedings before the State Bar Council are *sui generis*, are neither civil nor criminal in character, and are not subject to the ordinary criminal procedural safeguards. The purpose of disciplinary proceedings is not punitive but to inquire, for the protection of the public, the Courts and the legal profession, into fitness of the subject to continue in the capacity of an advocate. Findings in disciplinary proceedings must be sustained by a higher degree of proof than that required in civil suits, yet falling short of the proof required to sustain a conviction in a criminal prosecution. There should be convincing preponderance of evidence. That test is clearly fulfilled in the instant case.

29. When a lawyer has been tried by his 'peers' in the words of our brother Desai J., there is no reason for this Court to interfere in appeal with the finding in such a domestic enquiry merely because on a re-appraisal of the evidence a different view is possible. In the facts and circumstances of the case, we are satisfied that no other conclusion is possible than the one reached. There is, therefore, no ground for interference with the finding of the Disciplinary Committee of the Bar Council of India.

30. It is not in accordance with professional etiquette for one advocate to hand over his brief to another to take his place at a hearing (either for the whole or part of the hearing) and conduct the case as if the latter had himself been briefed, unless the client consents to this course being taken. Counsel's paramount duty is to the client; accordingly where he forms an opinion that a conflict of interest exists, his duty is to advise the client that

he should engage some other lawyer. It is unprofessional to represent conflicting interests except by express consent given by all concerned after a full disclosure of the facts.

31. Nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession. Lord Brougham, then aged eighty-six, said in a speech, in 1864, that the first great quality of an advocate was 'to reckon everything subordinate to the interests of his client'. What he said in 1864 about the paramountcy of the 'client's interest', is equally true today. The relation between a lawyer and his client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character requiring a high degree of fidelity and good faith. It is purely a personal relationship, involving the highest personal trust and confidence which cannot be delegated without consent. A lawyer when entrusted with a brief, is expected to follow the norms of professional ethics and try to protect the interests of his clients, in relation to whom he occupies a position of trust. The appellant completely betrayed the trust reposed in him by the complainants.

32. It is needless to stress that in a case like this the punishment has to be deterrent. There was in this case complete lack of candour on the part of the appellant, in that he in a frantic effort to save himself, threw the entire blame on his junior, K.S. Lakshmi Kumaran. The evidence on record clearly shows that it was the appellant who had been engaged by the complainants to file suits on the two promissory notes for recovery of a large sum of Rs.20,000 with interest due thereon. There was also complete lack of probity on the part of the appellant because it appears that he knew the debtor, Smt. Maragathammal for 7/8 years and had, indeed, been appearing for her in succession certificate proceedings. If there was any conflict of interest and duty, he should have declined to accept the brief. What is reprehensible is that he not only accepted the brief, but pocketed the money meant for Court fees, and never filed the suits.

33. The appeal for mercy appears to be wholly misplaced. It is a breach of integrity and a lack of probity for a lawyer to wrongfully with hold the money of his client. In a case of such grave professional misconduct the State Bar Council observes that the appellant deserved the punishment of disbarment, but looking to his young age, only suspended him from practice for a period of six years. The Disciplinary Committee of the Bar Council of India has already taken a lenient view and reduced the period of suspension from six years to one year, as in its view the complainants did not suffer by the suits not being proceeded with because even if they had obtained decrees for money. they would still have been required to file a regular mortgage suit for the sale of the property charged.

34. In the facts and circumstances of the case, I am of the view that the punishment awarded by the Disciplinary Committee the Bar Council of India does not warrant any further interference.

35. I have had the advantage of reading the judgment of my learned brother Krishna Iyer for the restitution to the appellant of his right to practice upon fulfilment of certain conditions. I have my own reservations in the matter, that is, whether any such direction should at all be made in the present case.

36. Where it is shown that the advocate acted in bad faith towards his client in detaining or misappropriating funds of the clicent, or that the wrong was committed or aided by means of false representations, fraud or deccit, as here, the fact that the advocate makes restitution to or settlement with the client will not prevent disbarment, especially where restitution was not made until after the commencement of the disciplinary proceedings. It is only an ameliorating circumstance but does not mitigate the offence involved in the misappropriation, particularly when the repayment is made under pressure.

37. When there is disbarment or suspension from practice, the lawyer must prove, if he can, after the expiration of a reasonable length of time, that he appreciates the significance of his dereliction, that he has lived a consistent life of probity and integrity, and that he possesses the good character necessary to guarantee uprightness and honour in his professional dealings, and therefore is worthy to be restored. The burden is on the applicant to establish that he is entitled to resume the privilege of practising law without restrictions. There is nothing of the kind in the present case.

38. Further, even if this Court has the power to make such a direction, in terms of section 38, the Court has a duty to act with justice to the profession and the public as well as the appellant seeking reinstatement, and without regard to mere feelings of sympathy for the applicant. Feelings of sympathy or a feeling that the lawyer has been sufficiently punished are not grounds for reinstatement.

39. I also doubt whether a direction can be made requiring the advocate to undertake free legal aid during the period of his suspension. This would be a contradiction in terms. Under section 35 (4), when an advocate is suspended rom practice under clause (c) of sub-section (3) thereof, he shall, during the period of suspension, be debarred from practising in any Court or before any authority or person in India. If the making of such a direction implies the termination of the order of suspension, on the fulfilment of the conditions laid down, I am of the considered view that no restriction on the right of the advocate to appear before any Court or authority, which privilege he enjoys under section 30 of the Act, can be imposed.

40. The taking of the lenient view in the facts and circumstances of the case, I feel, would not be conducive to the disciplinary control of the State Bar Councils. I would, for these reasons, dismiss the appeal and maintain the punishment imposed on the appellant.

41. In conclusion, I do hope the appellant will fully reciprocate the noble gesture shown to him by the majority, come up to their expectations and turn a new leaf in life. It should be his constant endeavour to keep the fair name of the great profession to which he belongs unsullied.

V.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

PRESENT:—*P.N. Bhagwati, V. D. Tulzapurkar and R.S. Pathak, JJ.*

Rajapalayam Mills Ltd. .. *Appellant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

(A) *Indian Income-tax Act* (*XI of* 1922), *sections* 10 (2) (vi) (*vi-b*) and 15-C—*Newly established industrial undertaking—Tax benefit—"Profits or gains derived from new industrial undertaking"—Connotation of—Computation of profits of current year —Depreciation allowance and development rebate of past years absorbed against profits of other business —Whether to be taken into account.*

(B) *Income-tax Act* (*XLIII of* 1961), *section* 84.

During the financial year ending 31st March, 1959, being the accounting year relevant to the assessment year 1959-60, the assessee set up a new industrial undertaking which admittedly satisfied the requirement of section 15-C (2) of the Indian Income-tax Act, 1922. In the assessment year 1959-60, the total profit of the assessee in respect of its old and new units came to Rs. 2,42,432, including Rs. 33,118 in respect of the new unit and the total depreciation amounted to Rs. 2,66,651 including Rs. 1,44,361 in respect of the new unit and after setting off the amount of depreciation against the total profit, a sum of Rs. 24,183 remained as unabsorbed depreciation which was carried forward to the next year. The entire development rebate, which included Rs. 5,07,336 in respect of the new unit, also remained unabsorbed owing to the smallness of the profit and that too had to be carried forward. The total profit of the assessee in respect of its old and new units for the assessment year 1960-61 was Rs. 14,13,604 inclusive of Rs. 3,64,672 in respect of the new unit and this was large enough to absorb the carried forward depreciation and development rebate as also the current year's depreciation and development rebate in respect of both the units. In fact, after setting off of such depreciation and development rebate, a sum of Rs. 3,25,176 remained as the

* C.A. Nos. 1989 of 1972 and 2418 of 1977.
6th October, 1978.

taxable income of the assessee and it was assessed to tax in its hands. The result was that no part of the depreciation or development rebate for the assessment years 1959-60 and 1960-61 remained unabsorbed to be carried forward to the next assessment year 1961-62. The position in the assessment year 1961-62 was that the assessee earned a net business income of Rs. 12,69,403 which included a sum of Rs. 1,08,822 representing the income from the new unit. The assessee in its assessment to tax for this assessment year claimed exemption of the income from the new unit to the extent of 6% of the average capital employed in it under section 15-C. The Income-tax Officer took the view that the benefit of section 15-C, sub-section (1), could be claimed by the assessee only if there was any profit derived from the new unit and since this profit was, by reason of sub-section (3) of section 15-C, required to be computed in accordance with the provisions of section 10, it was necessary to work out the trading result of the new unit without reference to any other activity carried on by the assessee and if that was done, the result would clearly show that there was a loss in the working of the new unit in the assessment year 1961-62, and hence the benefit of the exemption under section 15-C, sub-section (1) was not available to the assessee. On appeal by the assessee the Appellate Assistant Commissioner allowed the claim for exemption. On appeal by the revenue, the Tribunal held that the benefit of the exemption under section 15-C, sub-section (1) was not available and the Income-tax Officer was justified in refusing to grant such exemption. The High Court on a reference agreed with the view taken by the Tribunal. The same question also arose in the assessment of the assessee to tax for the assessment year 1962-63, but in this assessment year the law in force was the Income-tax Act, 1961, which had come into force with effect from 1st April, 1962. The corresponding provision in section 84 of the new Act was, however, in material respects in the same terms as section 15-C of the old Act. The claim for exemption made by the assessee under section 84 for the assessment year 1962-63 met with the same fate as the claim for the earlier assessment year. On appeal to the Supreme Court,

Held, that there is nothing in sub-section (3) of section 15-C or in any other provision of the Act which requires that in computing the profits or gains of a new industrial undertaking under section 10 depreciation allowance or development rebate in respect of the new industrial undertaking for the past assessment years should be taken into account, even if it has been set-off fully against the profits or gains of any other business carried on by the assessee or against income under any other head and there is no unabsorbed depreciation allowance or development rebate to be carried forward. It is indeed difficult to see how effect can be given to depreciation allowance and development rebate twice over, once in the past assessment years and again in the assessment year in question. To give effect to depreciation allowance or development rebate for the past assessment years even though it has been set-off and absorbed completely against the total income of the assessee for those assessment years would be to allow a deduction not warranted by any provision of the Act and indeed it would be going contrary to the express provision of proviso (*b*) to clause (vi) and *Explanation* 1 to clause (vi-*b*). Sub-section (3) of section 15-C clearly does not have any such effect. What it does is no more than provide as to how "the profits or gains derived from new industrial undertaking" referred to in sub-section (1) of section 15-C shall be computed. If sub-section (3) of section 15-C had not been enacted, it might have been a matter of some controversy as to what is meant by the expression "the profits or gains derived from new industrial undertaking". Does it mean commercial profits or gains or profits or gains chargeable to tax or does it have any other connotation? It was to set this controversy at rest that sub-section (3) of section 15-C enacted that the profits or gains of the new industrial undertaking shall be computed in accordance with the provisions of section 10. It may be noted that sub-section (3) of section 15-C does not enact any legal fiction providing that the profits or gains of the new industrial undertaking shall be computed as if the new industrial undertaking were the only business of the assessee from the date of its establishment or the past years' depreciation or development rebate had not been set-off against other income of the assessee. The new industrial undertaking is not retrospectively quarantined or isolated from the other income-producing activities of the assessee for determining its profits or gains for the purpose of applicability of sub-section (1) of section 15-C. What sub-section (3) of section 15-C does is merely to lay down

the same rule of computation for the profits or gains of a new industrial undertaking as in respect of any other business and, therefore, neither depreciation allowance nor development rebate in respect of the new industrial undertaking for the past assessment years can be allowed as a deduction in computing the profits or gains for the assessment year in question, except where and to the extent to which, it has not been set-off against the total income of the assessee of those assessment years and has remained unabsorbed. This is the plain and undoubted effect of the language used in sub-section (3) of section 15-C. Indeed, the language is so clear and unambiguous that it is impossible to place any other construction upon it. Since section 15-C of the Indian Income-tax Act, 1922, and section 84 of the Income-tax Act, 1961, are in material respects in identical terms, the interpretation placed on section 15-C is bound to apply equally to section 84.

[*Paras.* 1, 11.]

It is settled law that though the profits of each distinct business carried on by an assessee have to be computed separately in accordance with the provisions of section 10 the tax is chargeable under that section not separately on the profits of each business, but on the aggregate of the profits of all the businesses carried on by the assessee. It follows, therefore, that where the assessee carries on several businesses, he is entitled under section 10 to set-off the loss in one business against profits in another. If there is any loss in a business carried on by the assessee by reason of the profits of such business not being sufficient to absorb the depreciation allowance, such loss can be set-off against the profits of another business carried on by the assessee. If, however, there are no profits chargeable under the head "Business or profession", or if the profits chargeable under that head are insufficient to cover the depreciation allowance the amount of the allowance to the extent to which it is not absorbed can be set-off against profits chargeable under any other head for that assessment year. This is the plain and undoubted effect of section 24, sub-section (1).

[*Para.* 9.]

It is clear on a plain reading of the language of proviso (*b*) to clause (vi) of section 10 that it comes into operation only where full effect cannot be given to the depreciation, allowance for the assessment year in question owing to there being no profits or gains chargeable for that year or profits or gains chargeable being less than the depreciation allowance. The words "no profits or gains chargeable for that year" are not confined to profit and gains derived from the business whose income is being computed under section 10, but they refer to the totality of the profits or gains computed under the various heads and chargeable to tax. When the profits or gains of a business for a particular assessment year are to be computed under section 10, the current depreciation allowance for the assessment year in question is deductible under clause (*vi*) but the depreciation allowance of the preceding years would be liable to be taken into account only, if and to the extent to which, it is not absorbed by the total income of the assessee computed under different heads and chargeable to tax for those assessment years.

[*Para.* 9.]

In a case where the machinery is installed in an earlier assessment year, it is only if the whole of the development rebate has not been fully set-off against the total income of the assessee in the past assessment years and a part of it has remained unabsorbed and is carried forward that it can be set-off against the profits or gains of the business for the particular assessment year. But if the whole of the development rebate has been absorbed and no part of it is carried forward, there can be no question of allowing it against the profits or gains of the business for the assessment year in question.

[*Para.* 10.]

Cases referred to: —

Anglo French Textile Co., Ltd. v. *Commissioner of Income-tax*, (1953) 23 I.T.R. 82 : 1953 S.C.J. 101 : (1953) I M.L.J. 385 : 1953 S.C.R. 448 : A.I.R. 1953 S.C. 111; *Commissioner of Income-tax* v. *Indo-Mercantile Bank Ltd.*, (1959) 36 I.T.R. 1 : 1959 S.C.J.655 : A.I.R. 1959 S.C. 713 ; *Commissioner of Income-tax* v. *Muthuraman Chettiar*, (1962) 44 I.T.R. 710 ; *Commissioner of Income-tax* v. *Jaipuria China Clay Mines (P.) Ltd.*, (1966) 59 I.T.R. 555 : (1966) 2 S.C.R. 449 : (1966) 1 I.T.J. 341 : (1966) 1 S.C.J. 413 : A.I.R. 1966 S.C. 1187.

Appeals from the judgments and orders of the Madras High Court, dated 3rd January, 1970, in Tax Case No. 112 of 1966 and dated 18th January, 1973, in Tax Case No. 84 of 1971,

T. A. Ramachandran, Advocate, for Appellant in C.A. No. 1989 of 1972.

J. Ramamurthi and *Miss R. Vaigai*, Advocates, for Appellant in C.A. No. 2418 of 1977.

P.A. Francis, Senior Advocate (*Miss A.Subhashini*, Advocate, with him), for Respondent in C.A. No. 1989 of 1972.

B.B. Ahuja and *Miss A. Subhashini*, Advocates, for Respondent in C.A. No. 2418 of 1977.

T.A. Ramachandran, Advocate, for Intervener, Senapathi Whiteley & Co. Ltd.

Dr. Devi Pal, Senior Advocate (*S. Swarup* and *J.B. Dadachanji & Co.*, Advocates, with him), for Intervener, Indian Aluminium Co.

R.N. Bajoria, P.V. Kapur, U.K. Khaitan, Praveen Kumar and *R.K. Chaudhary*, Advocates, for Intervener, Orient Paper Mills Ltd.

The Judgment of the Court was delivered by

Bhagwati, J.—These two appeals by special leave raise a short but interesting question of law relating to the interpretation of section 15-C of the Indian Income-tax Act, 1922, and section 84 of the Income-tax Act, 1961. These two sections are in material respects in identical terms and the interpretation we place on section 15-C is bound to apply equally to section 84. We will, therefore, first deal with Civil Appeal No. 1989 of 1972 which involves the interpretation of section 15-C and then turn to Civil Appeal No. 2418 of 1977, which deals with section 84.

2. The assessee in Civil Appeal No. 1989 of 1972 is a public limited company carrying on business in manufacture and sale of yarn. During the financial year ending 31st March, 1959, being the accounting year relevant to the assessment year 1959-60, the assessee set up a new industrial undertaking which admittedly satisfied the requirement of section 15-C (2) of the Indian Income-tax Act, 1922. The profit, depreciation and development rebate in respect of this new unit for the assessment years 1959-60 and 1960-61 were as follows :

Year	*Profit*	*Depreciation and development rebate*
	Rs.	Rs.
1959-60	33,118	1,44,361
		5,07,336 (development rebate)
1960-61	3,64,672	3,19,591
		1,17,205 (development rebate)
	3,97,790	10,88,493

In the assessment year 1959-60, the total profit of the assessee in respect of its old and new units came to Rs. 2,42,432, including Rs. 33,118 in respect of the new unit and the total depreciation amounted to Rs. 2,66,651 including Rs. 1,44,361 in respect of the new unit and after setting off the amount of depreciation against the total profit, a sum of Rs. 24,183 remained as unabsorbed depreciation which was carried forward to the next year. The entire development rebate, which included Rs. 5,07,336 in respect of the new unit, also remained unabsorbed owing to the smallness of the profit and that too had to be carried forward. The total profit of the assessee in respect of its old and new units for the assessment year 1960-61 was Rs. 14,13,604 inclusive of Rs. 3,64,672 in respect of the new unit and this was large enough to absorb the carried forward depreciation and development rebate as also the current year's depreciation and development rebate in respect of both the units. In fact, after setting off of such depreciation and development rebate, a sum of Rs. 3,25,176 remained as the taxable income of the assessee and it was assessed to tax in its hands. The result was that no part of the depreciation or development rebate for the assessment years 1959-60 and 1960-61 remained unabsorbed to be carried forward to the next assessment year 1961-62.

3. The position in the assessment year 1961-62 was that the assessee earned a net business income of Rs. 12,69,403 which included a

sum of Rs. 1,08,822 representing the income from the new unit. The assessee in its assessment to tax for this assessment year claimed exemption of the income from the new unit to the extent of 6% of the average capital employed in it under section 15-C. This section in so far as material, read as follows:

> "(1) Save as otherwise hereinafter provided, the tax shall not be payable by an assessee on so much of the profits or gains derived from any industrial undertaking (or hotel) to which this section applies as do not exceed six per cent. per annum on the capital employed in the undertaking (or hotel), computed in accordance with such rules as may be made in this behalf by the Central Board of Revenue....
>
> (3) The profits or gains of an industrial undertaking (or a hotel) to which this section applies shall be computed in accordance with the provisions of section 10.
>
> (4) The tax shall not be payable by a shareholder in respect of so much of any dividend paid or deemed to be paid to him by an industrial undertaking (or a hotel) as is attributable to that part of the profits or gains on which the tax is not payable under this section.
>
> (*Explanation.*—The amount of dividend in respect of which the tax is not payable under this sub-section shall be computed in accordance with such rules as may be made in this behalf by the Central Board of Revenue.)
>
> ......
>
> (6) The provisions of this section shall (in relation to an industrial undertaking), apply to the assessment for the financial year next following the previous year in which the assessee begins to manufacture or produce articles and for the four assessments immediately succeeding......."

The Income-tax Officer took the view that the benefit of section 15-C, sub-section (1), could be claimed by the assessee only if there was any profit derived from the new unit and since this profit was, by reason of sub-section (3) of section 15-C, required to be computed in accordance with the provisions of section 10, it was necessary to work out the trading result of the new unit without reference to any other activity carried on by the assessee and if that was done, the result would clearly show that there was a loss in the working of the new unit in the assessment year 1961-62. The computation made by the Income-tax Officer was as under. The total depreciation and development rebate in respect of the new unit for the assessment years 1959-60 and 1960-61 was Rs. 10,88,493, while the profit for these two assessment years came to only Rs. 3,97,790 so that, taking into account only the trading result of the new unit as if that was the only source of income of the assessee during the assessment years 1959-60 and 1960-61, a sum of Rs. 6,90,703 representing the excess of depreciation and development rebate over profit remained unabsorbed to be carried forward to the next assessment year 1961-62. If this carried forward depreciation and development rebate amounting to Rs. 6,90,703 were allowed against the profit of Rs. 1,36,822 derived from the new unit in the assessment year 1961-62, there would be a resultant loss and hence the benefit of the exemption under section 15-C, sub-section (1), was held not available to the assessee and the claim of the assessee for exemption was rejected.

4. The assessee carried the matter in appeal before the Appellate Assistant Commissioner, and the assessee succeeded in making good its claim for exemption under section 15-C, sub-section (1). The Appellate Assistant Commissioner pointed out in a brief but precise order:

> "The loss of Rs. 6,90,703, being depreciation in excess of the income made by the new mill, was set-off against the income of the old mill in both the years and the net result for the assessment year 1960-61 was a positive figure which was assessed to tax. There is no question of once again carrying forward the depreciation of the new mill to the assessment year 1961-62 and allowing it against the income of the new mill. It is only when there is a loss of the earlier year due to depreciation attributable to the new industrial undertaking which could not be set-off against the profits of the earlier years, it has to be carried forward and set-off against the income of the current year in working out the income liable to tax under section 10."

The Appellate Assistant Commissioner accordingly allowed the claim for exemption and directed the Income-tax Officer to modify the assessment in conformity with this decision,

5. The revenue being aggrieved by the decision of the Appellate Assistant Commissioner. preferred an appeal before the Tribunal The appeal was successful and the Tribunal set aside the order of the Appellate Assistant Commissioner and restored that of the Income-tax Officer. The Tribunal took the view that the trading result of the new unit must be considered as if it stood by itself, ignoring every other income-producing activity of the assessee and if that was done, it was clear that there was an unabsorbed depreciation and development rebate of Rs. 6,90,703 in respect of the new unit which was required to be carried forward and treated as part of the allowance for the assessment year 1961-62 and that would wholly wipe out the profit of Rs. 1,36,822 leaving a resultant loss in the new unit for the assessment year 1961-62. The Tribunal in this view held that the benefit of the exemption under section 15-C, sub-section (1), was not available and the Income-tax Officer was justified in refusing to grant such exemption.

6. This led to the filing of an application for reference by the assessee and on the application, the Tribunal stated a case and referred the following question of law for the opinion of the High Court :

> "Whether, on the facts and in the circumstances of the case, the assessee-company was entitled to the relief under section 15-C (2)."

7. The High Court agreed with the view taken by the Tribunal and proceeding on the assumption that for the purpose of determining the applicability of section 15-C, sub-section (1), the new unit was required to be treated in isolation, as if no other income producing activity was carried on by the assessee, the High Court observed that there was unabsorbed depreciation and development rebate of Rs. 6,90,703 in respect of the new unit which was required to be carried forward and set-off against the profit of Rs. 1,36,822 derived from the new unit in the assessment year 1961-62 and since that left the new unit in a resultant position of loss, the assessee was not entitled to claim the benefit of the exemption under section 15-C, sub-section (1). The High Court accordingly answered the question referred by the Tribunal in favour of the revenue and against the assessee. The assessee thereupon preferred the present Civil Appeal No. 1989 of 1972, after obtaining certificate of fitness from the High Court.

8. The same question also arose in the assessment of the assessee to tax for the assessment year 1962-63, but in this assessment year the law in force was the Income-tax Act, 1961, which had come into force with effect from 1st April, 1962. The corresponding provision in section 84 of the new Act was, however, in material respects in the same terms as section 15-C of the old Act. The claim for exemption made by the assessee under section 84 for the assessment year 1962-63 met with the same fluctuating vicissitudes of fortune as the claim for the earlier assessment year and ultimately, the Tribunal having decided against the assessee, a reference of the question whether on the facts and the circumstances of the case the assessee was entitled to exemption under section 84 was made to the High Court. The High Court, in view of its decision for the earlier assessment year, decided against the assessee and, hence the present Civil Appeal No. 2418 of 1977 was brought by the assessee after obtaining certificate of fitness from the High Court. Since both sections 15-C and 84 are, for all material purposes, in identical terms, we will discuss the interpretation and applicability of section 15-C in Civil Appeal No. 1989 of 1972 and the view we take in that appeal will equally govern the decision of Civil Appeal No. 2418 of 1977.

9. The law of income-tax in a modern society is intended to achieve various social and economic objectives. It is often used as an instrument for accelerating economic growth and development. Section 15-C is a provision introduced in the Indian Income-tax Act, 1922, with a view to carrying out this objective and it is calculated to encourage setting up of new industrial undertakings in the country. Sub-section (1) of this section exempts from tax so much of the profits or gains derived from a new industrial undertaking as do not exceed 6% per annum of the capital employed in the undertaking. There are rules made under the Act for computing the capital employed in a new industrial undertaking but we are not concerned with these rules in the present appeals. What is material is only the provision for exemption and, according to this provision, the profits and gains of a new industrial undertaking are exempt from tax to the extent of 6% per annum of the capital employed, and obviously, therefore, there must be profits or gains derived from the new indus-

trial undertaking in the assessment year in question before any claim for exemption can be sustained under section 15-C, sub-section (1). If there are no profits or gains derived from the new industrial undertaking in any particular assessment year there can be no question of any exemption, because it is only where there are such profits or gains that to the extent of 6% per annum of the capital employed, they become eligible, for exemption. The first question which must, therefore, arise for consideration in every case where a claim for exemption is made under section 15-C, sub-section (1), is whether there are any profits or gains derived from the new industrial undertaking in the assessment year in question, and, if so, what is the quantum of such profits or gains. Now sub-section (3) of section 15-C says that the profits or gains of a new industrial undertaking shall be computed in accordance with the provisions of section 10 and since, under the income-tax law, every assessment year is a self-contained period, the profits and gains of the new industrial undertaking must be computed for the particular assessment year in respect of which the claim for exemption is made, by applying the provisions of section 10. Sub-section (2) of that section provides for various allowances to be made in computing profits and gains of a business and amongst such allowances are, one in respect of depreciation and the other in respect of development rebate. Clause (*vi*) of sub-section (2) deals with allowance of depreciation and it says that in computing the profits or gains of a business allowance shall be made in respect of depreciation of building, machinery, plant or furniture belonging to the assessee and used for the purpose of the business, of a sum equivalent to "such percentage on the written-down value thereof as may in any case or class of cases be prescribed". Depreciation calculated in accordance with the provisions of clause (*vi*) is thus allowable in computing the profits and gains of a business chargeable to tax and if the profits and gains of the business are insufficient to absorb such depreciation allowance, the amount of the allowance to the extent it is unabsorbed, must, like any other business loss be set-off against the profits of any other business. It is settled law that though the profits of each distinct business carried on by an assessee have to be computed separately in accordance with the provisions of section 10 the tax is chargeable under that section not separately on the profits of each business, but on the aggregate of the profits of all the businesses carried on by the assessee: Vide *Anglo French Textile Co., Ltd.* v. *Commissioner of Income-tax*[1]; *Commissioner of Income-tax* v. *Indo Mercantile Bank Ltd.*[2], *Commissioner of Income-tax* v. *Muthuraman Chettiar*[3]. It follows therefore, that where the assessee carries on several businesses, he is entitled under section 10 to set-off loss in one business against profits in another. If there is any loss in a business carried on by the assessee by reason of the profits of such business not being sufficient to absorb the depreciation allowance, such loss can be set-off against the profits of another business carried on by the assessee. If, however, there are no profits chargeable under the head "business or profession" or if the profits chargeable under that head are insufficient to cover the depreciation allowance, the amount of the allowance to the extent to which it is not absorbed can be set-off against profits chargeable under any other head for that assessment year. This is the plain and undoubted effect of section 24, sub-section (1), as explained in *Commissioner of Income tax* v. *Indo-Mercantile Bank Ltd.*[2]. But what would happen if still some part of the depreciation allowance remains unabsorbed. The answer is provided by proviso (b) to clause (*vi*) of section 10 (2) which reads as follows :—

"Provided that—.......

(*b*) Where (in the assessment of the assessee or if the assessee is a registered firm, in the assessment of its partners), full effect cannot be given to any such allowance in any year (not being a year which ended prior to the 1st April, 1939), owing to their being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance (then, subject to the provisions of clause (*b*) of the proviso to sub-section (2) of section 24), the allowance or part of the allowance to which effect has not been given, as the case may be shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if

1. (1953) 23 I.T.R. 85 at 86: (1953) 1 M.L.J. 385: 1953 S.C.R. 448: 1953 S.C.J. 101: A.I.R. 1953 S.C. 111.

2. (1959) 86 I.T.R. 1 at 6 : 1959 S.C.J. 655: A.I.R. 1959 S.C. 713.

3. (1964) 44 I.T.R. 710 at 713.

there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years."

It is clear on a plain reading of the language of proviso (*b*) to clause (vi) that it comes into operation only where full effect cannot be given to the depreciation allowance for the assessment year in question owing to there being no profits or gains chargeable for that year or profits or gains chargeable being less than the depreciation allowance. Now, it is well settled, as a result of the decision of this Court in *Commissioner of Income-tax v. Jaipuria China ClayMines (P) Ltd.*[1], that the words "no profits or gains chargeable for that year" are not confined to profits and gains derived from the business whose income is being computed under section 10, but they refer to the totality of the profits or gains computed under the various heads and chargeable to tax. It is, therefore, clear that effect must be given to depreciation allowance first against the profits or gains of the particular business whose income is being computed under section 10 and if the profits of that business are not sufficient to absorb the depreciation allowance, the allowance to the extent to which it is not absorbed would be set-off against the profits of any other business and if a part of the depreciation allowance still remains unabsorbed, it would be liable to be set-off against the profits or gains chargeable under any other head and it is only if some part of the depreciation allowance still remains unabsorbed that it can be carried forward to the next assessment year. Obviously, therefore, there would be no scope for the applicability of proviso (*b*) to clause (*vi*), if the total income of the assessee chargeable to tax is sufficient to absorb the depreciation allowance, for then there would not be any unabsorbed depreciation allowance to be carried forward to the following assessment year. But where any part of the depreciation allowance remains unabsorbed after being set-off against the total income chargeable to tax, it can be carried forward under proviso (*b*) to clause (*vi*) to the following year and set-off against that year's income and so on for succeeding years. The method adopted by the statute for achieving this result is that the carried forward depreciation allowance is deemed to be part of and stands on exactly the same footing as the current depreciation for the assessment year and is thus allowable as a deduction under clause (*vi*). It would therefore, be seen that when the profits or gains of a business for a particular assessment year are to be computed under section 10, the current depreciation allowance for the assessment year in question is deductible under clause (*vi*), but the depreciation allowance of the preceding years would be liable to be taken into account only if, and to the extent to which, it is not absorbed by the total income of the assessee computed under different heads and chargeable to tax for those assessment years.

10. The position in regard to development rebate is the same. The relevant provision in that behalf is to be found in clause (vi-b) of sub-section (2) of section 10. That clause, in so far as material, provides as follows :

"10. (2) Such profits or gains shall be computed after making the following allowances, namely:— ......

(*vib*) in respect of....new machinery or plant installed after the 31st day of March, 1954, which is wholly used for the purposes of the business carried on by the assessee, a sum by way of development rebate in respect of the year.... of the installation of the machinery or plant, equivalent to,— ....

(*ii*) in the case of machinery or plant installed before the 1st day of April, 1961, twenty-five per cent. and in the case of machinery or plant installed after the 31st day of March, 1961, twenty per cent. of the actual cost of the machinery or plant to the assessee :

Explanation 1.—In the case of..machinery or plant installed after the 31st day of December, 1957, where the total income of the assessee for the year of...... installation (the total income for this purpose being computed without making any allowance under this clause) is *nil* or is less than the full amount of the development rebate calculated at the rate applicable thereto under this clause,—

(*i*) the sum to be allowed by way of development rebate for that year under this clause shall be only such amount as is sufficient to reduce the said total income to *nil*; and

1. (1966) 59 I.T.R. 555 : (1966) 2 S.C.R. 449: (1966) 1 S.C.J. 413: (1966) 1 I.T.J. 341: A.I.R. 1966 S.C. 1187.

(*ii*) the amount of the development rebate, to the extent to which it has not been allowed as aforesaid, shall be carried forward to the following year, and the development rebate to be allowed for the following year shall be such amount as is sufficient to reduce the total income of the assessee for that year, computed in the manner aforesaid, to *nil*, and the balance of the development rebate, if any, still outstanding shall be carried forward to the following year and so on, so however, that no portion of the development rebate shall be carried forward for more than eight years......"

The amount of development rebate in respect of new machinery used for the purpose of the business is allowable in the year of installation of the machinery under sub-clause (*ii*) of clause (*vib*), but *Explanation* 1 provides that if the total income of the assessee for the year of installation is *nil* or is less than the full amount of the development rebate, the amount of the development rebate, to the extent to which it is not absorbed, may be carried forward to the following year and set-off against the total income of the assessee for that year and if even thereafter, a part of the development rebate remains unabsorbed, the balance outstanding may be carried forward to the following year and so on for an aggregate period not exceeding eight years. Though the amount of the development rebate is, under the main provision in sub-clause (*ii*) of clause (*vib*), allowable in the first instance against the profits or gains of the particular business whose profits or gains are being computed, clause (i) of *Explanation* 1 makes it clear that if any part of the development rebate remains unabsorbed, it is to be set-off against the other income of the assessee under any of the chargeable heads and it is only if some part of the development rebate still remains outstanding that it can be carried forward to the following assessment year and set-off against the total income of the assessee for that year. The amount of the development rebate is to be set-off against the total income of the assessee and not merely against the profits or gains of the particular business in respect of which the development rebate is granted and so also the development rebate which remains unabsorbed and is carried forward to the next assessment year is, by reason of clause (*ii*) of *Explanation* 1, to be set-off not merely against the profits or gains of the particular business but against the total income of the assessee for that year. It would, therefore, be seen that it is only where the amount of development rebate has not been fully set-off against the total income of the assessee in the past assessment years and a part of it still remains unabsorbed and is carried forward to the assessment year in question that it can be allowed against the profits or gains of the business for the particular assessment year and if there is still some balance outstanding, then against the other income of the assessee for that assessment year. But if the amount of the development rebate is wholly set-off against the total income of the assessee in the past assessment years and there is no unabsorbed development rebate to be carried forward to the assessment year in question, there would be nothing in respect of the past development rebate to be set-off against the profits, or gains of the business under clause (*ii*) of *Explanation* 1. It is, therefore, necessary, when the profits or gains of business are being computed under section 10 to ask the question whether the machinery in respect of which the development rebate is admissible has been installed in the assessment year in question, and if it is found that it has been installed earlier, whether any part of the development rebate has remained unabsorbed against the *total income* of the assessee in the past assessment years and is carried forward to the present assessment years. In a case where the machinery is installed in an earlier assessment year, it is only if the whole of the development rebate has not been fully set-off against the *total income* of the assessee in the past assessment years and a part of it has remained unabsorbed and is carried forward that it can be set off against the profits or gains of the business for the particular assessment year. But if the whole of the development rebate has been absorbed and no part of it is carried forward, there can be no question of allowing it against the profits or gains of the business for the assessment year in question.

11. Now sub-section (3) of section 15-C provides that the profits or gains of a new industrial undertaking shall be computed under section 10 and, therefore, according to clause (*vi*) read under proviso (b), no part of the depreciation allowance and according to clause (*vib*), *Explanation* 1, no part of the development rebate in respect of the new industrial undertaking for the past assessment years can be allowed as a deduction in computing the profits and gains, unless it has remained unabsorbed by reason of inadequacy of the total income chargeable to tax in the past

assessment years—and, as pointed out above, by total income we mean not only profits or gains derived from the new industrial undertaking but the totality of profits or gains computed under various heads—and is carried forward to the assessment year in question. There is nothing in sub-section (3) of section 15-C or in any other provision of the Act which requires that in computing the profits or gains of a new industrial undertaking under section 10, depreciation allowance or development rebate in respect of the new industrial undertaking for the past assessment years should be taken into account, even if it has been set-off fully against the profits or gains of any other business carried on by the assessee or against income under any other head and there is no unabsorbed depreciation allowance or development rebate to be carried forward. It is indeed difficult to see how effect can be given to depreciation allowance and development rebate twice over, once in the past assessment years and again in the assessment year in question. To give effect to depreciation allowance or development rebate for the past assessment years, even though it has been set-off and absorbed completely against the total income of the assessee for those assessment years would be to allow a deduction not warranted by any provision of the Act and indeed it would be going contrary to the express provision of proviso (*b*) to clause (*vi*) and *Explanation* 1 to clause (*vib*). Sub-section (3) of section 15-C clearly does not have any such effect. What it does is no more than provide as to how "the profits or gains derived from new industrial undertaking" referred to in sub-section (1) of section 15-C shall be computed. If sub-section (3) of section 15-C had not been enacted, it might have been a matter of some controversy as to what is meant by the expression "the profits or gains derived from new industrial undertaking". Does it mean commercial profits or gains or profits or gains chargeable to tax or does it have any other connotation? It was to set this controversy at rest that sub-section (3) of section 15-C enacted that the profits or gains of the new industrial undertaking shall be computed in accordance with the provisions of section 10. It may be noted that sub-section (3) of section 15-C does not enact any legal fiction providing that the profits or gains of the new industrial undertaking shall be computed as if the new industrial undertaking were the only business of the assessee from the date of its establishment or the past years, depreciation or development rebate had not been set-off against other income of the assessee. The new industrial undertaking is not retrospectively quarantined or isolated from the other income producing activities of the assessee for determining its profits or gains for the purpose of applicability of sub-section (1) of section 15-C. What sub-section (3) of section 15-C does is merely to lay down the same rule of computation for the profits or gains of a new industrial undertaking as in respect of any other business and, therefore, neither depreciation allowance nor development rebate in respect of the new industrial undertaking for the past assessment years can be allowed as a deduction in computing the profits or gains for the assessment year in question except where and to the extent to which, it has not been set-off against the *total income* of the assessee for those assessment years and has remained unabsorbed. This is the plain and undoubted effect of the language used in sub-section (3) of section 15-C. Indeed, the language is so clear and unambiguous that it is impossible to place any other construction upon it. But, apart from the language of the section, it may be noted that if the construction contended for on behalf of the revenue and upheld by the High Court as well as the Tribunal were accepted, it would lead to the highly anomalous result that, though for the purpose of computing the total income chargeable to tax, the depreciation allowance and development rebate which have been set-off against the other income of the assessee for the past assessment years would not be liable to be taken into account, they would have to be deducted in computing the profits or gains of the business for the purpose of applicability of sub-section (1) of section 15-C. Thus, there would be two different modes of determining the profits or gains of the business one for computing the total income chargeable to tax and the other for applying the provisions sub-section (1) of section 15-C. We cannot imagine that such a consequence could ever have been intended by the legislature.

12. We find in the present case from the undisputed figures on record that the whole of the depreciation allowance of Rs. 1,44,361 in respect of the new industrial undertaking for the assessment year 1959-60 could not be absorbed owing to the total profit of the assessee being insufficient and a sum of Rs. 24,183 remained as unabsorbed depreciation which

was carried forward to the assessment year 1960-61. The entire development rebate of Rs. 5,07,336 also remained unabsorbed and had to be carried forward to the assessment year 1960-61. But during the assessment year 1960-61, the total profit of the assessee came to Rs. 14,13,604 and this was sufficient to absorb not only the carried forward depreciation of Rs. 24,183 and the current year's depreciation, but also the carried forward development rebate of Rs. 5,07,336 and the development rebate of Rs. 1,17,205 in respect of machinery installed in that assessment year. The result was that no part of the depreciation allowance or development rebate remained unabsorbed to be carried forward to the assessment year 1961-62. If that be so, it is difficult to see how any part of the depreciation allowance or development rebate could possibly be allowed as a deduction in computing the profits or gains of the new industrial undertaking for the assessment year 1961-62. It is only if a part of the depreciation allowance or development rebate had remained unabsorbed against the total income of the assessee in the past assessment years that it could be carried forward and set off against the profit or gains of the new industrial undertaking for the assessment year 1961-62. But when admittedly the entire depreciation allowance and development rebate for the past assessment years were fully set-off against the total income of the assessee for those assessment years and no part of the depreciation allowance or development rebate remained unabsorbed, nothing could be deducted in respect thereof and, hence, for the purpose of sub-section (1) of section 15-C, the profits or gains of the new industrial undertaking for the assessment year 1961-62 came to Rs. 1,36,822 and the assessee was, in the circumstances, entitled to the benefit of the exemption under section 15-C, sub-section (1). We are, therefore, of the view that the High Court as well as Tribunal were in error in refusing the benefit of the exemption under section 15-C, sub-section (1), to the assessee for the assessment year 1961-62. The same view must also prevail in regard to the assessment year 1962-63 for, as we have pointed out above section 84 of the new Act is, in material respects, identical as section 15-C of the old Act. The reasoning which has weighed with us must apply equally in regard to the assessment year 1962-63 and we must likewise hold that the assessee was entitled to the benefit of the exemption under section 15-C, sub-section (1), in respect of the assessment year 1962-63 also.

13. We accordingly allow these appeals, set aside the judgment of the High Court and answer the questions referred by the Tribunal in both the appeals in favour of the assessee and against the revenue. The revenue will pay the costs of the assessee in both the appeals throughout.

T.K.K. ——— *Appeals allowed*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*R. S. Sarkaria, P. S. Kailasam and O. Chinnappa Reddy, JJ.*

A. KA. CT. V. CT. Meenakshisundaram Chettiar .. *Appellant**

v.

A. KA. CT. V. CT. Venkatachalam Chettiar .. *Respondent.*

Court-fees Act (VII of 1870), section 7 (iv) (f) — Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), section 35—Civil Procedure Code (V of 1908), Order 7, rule 11 (b)—Suit for accounts —Valuation for purposes of court-fee—Duty of plaintiff —Relief undervalued—Duty of Court.

Reading section 7 (*iv*) (*f*) of the Court-fees Act, 1870 by itself the amount of court-fee payable in suits for accounts is according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. The plaintiff is required to state the amount at which he values the relief sought. In suits for accounts it is not possible for the plaintiff to estimate correctly the amount which he may be entitled to for, when the plaintiff asks for accounting regarding the management by a Power-of-attorney agent, he might not know the state of affairs of the defendant's management and amount to which he would be entitled to on accounting. But it is necessary that the amount at which he values the relief sought for should be a reasonable estimate. [*Para. 7.*]

Order 7, rule 11 of the Code of Civil Procedure casts a duty on the Court to reject the plaint when the relief claimed is undervalued. If on the materials available before it the Court is satisfied that the value of relief, as estimated by the plaintiff in a suit for

* C.A. No. 504 of 1979. 23rd February, 1979.

accounts is under-valued the plaint is liable to be rejected. It is therefore necessary that plaintiff should take care that the valuation is adequate and reasonable taking into account the circumstances of the case. In coming to the conclusion that the suit is undervalued the Court will have to take into account that in a suit for accounts the plaintiff is not obliged to state the exact amount which would result after the taking of the accounts. If he cannot estimate the exact amount he can put a tentative valuation upon the suit for accounts which is adequate and reasonable. The plaintiff cannot arbitrarily and deliberately under value the relief. [*Para.* 7.]

In the present case on a consideration of the entire circumstances of the case it cannot be held that the estimate of the relief as given by the plaintiff is inadequate or unreasonable or a deliberation under-estimation.

[*Para.* 8.]

Case referred to:—

Chillakuru Chenchuram Reddy v. *Kanapuru Chenchumani Reddy,* I.L.R. (1969) Andh. Pra. 1042.

K. Rajendra Chaudhary, Advocate, for Appellant.

A. T. M. Sampath, Advocate, for Respondent.

A. V. Rangam, Advocate, for Intervener.

The Judgment of the Court was delivered by

Kailasam, J.—Special Leave Petition (Civil) No. 1021 of 1979 is filed by the plaintiff in the suit O.S. No. 83 of 1969 on the file of the Subordinate Judge, Devakottai, against the two orders passed by High Court of Judicature at Madras in Appeal No. 408 of 1972 holding that the suit had not been properly valued for court-fee and directing the petitioner to pay court-fee on the valuation of Rs. 9,74,598.35 and requiring that the deficit court-fee both on the plaint and the memorandum of appeal be paid within six weeks from the date of the order. On hearing the petitioner we directed notice to the respondents calling upon them to show cause why special leave should not be granted and the appeal allowed and remitted to the High Court for disposal of all the issues. On hearing the respondents we granted Special Leave Petition and the appeal is thus heard.

2. The appellant filed the suit praying for a decree against the respondent/defendant to render true and correct account of all the transactions of the respondent as the petitioners' agent from 22nd January, 1965 and also of all the amounts received by him as the agent of the petitioner including the amount recovered by him from Alagappa Chettiar and pay to the petitioner the amount found due on such rendition of accounts. In the written statement filed by the defendant it was contended that the suit is not properly valued and proper court-fee has not been paid. The trial Court framed an issue as to whether the suit had been properly valued and proper coure-fee had been paid. It answered the issue holding that the plaint has been properly valued and proper court-fee has been paid. The suit was dismissed by the trial Court on the ground that the plaintiff has not proved that the defendant is liable to account and that the suit was barred by limitation. On an appeal by the plaintiff to the High Court the High Court found that the plaint made it clear that apart from the money which the defendant is liable to pay to the plaintiff as his agent, the plaintiff has quantified the amount at Rs. 9,74,598.35 as payable by the defendant to him which is made clear in allegations in paras. 6, 7, 8 and 9 of the plaint and therefore the plaintiff ought to have valued the suit at Rupees 9,74,598.35. As the appeal was disposed of on the ground that the plaint had not been properly valued we are concerned in this petition in determining whether the conclusion arrived at by the High Court is correct.

3. The High Court has passed its conclusion on a reference to paras. 6, 7, 8 and 9 of the plaint. We will now consider the pleadings in the case. In paragraph 5, it is stated that on 22nd January, 1965, the plaintiff executed a General Power-of-Attorney at Karaikudi authorising the defendant to transact all his business, sell his properties, receive the sale price and other monies etc. This paragraph refers to the General Power-of-Attorney executed by the plaintiff in favour of the defendant on 22nd January, 1965. The terms of the power-of-attorney will be referred to in due course. Paragraphs 6, 7, 8 and 9 of the plaint which have been relied on by the High Court may be set out:—

6. On 27th March, 1965, the plaintiff and the defendant retired from the said partnership and the other two brothers continued the business under the same name, Alagappa taking on the shares of the plaintiff and defendant and all their assets in the firm for a consideration of his paying dollars 6,50,000 equivalent to Rs. 16,12,000 at the rate of Rs. 248 per 100 dollars to each of them, so that Alagappa became entitled to ¾ share and Annamalai to ¼ share in the continuing firm.

7. As the plaintiff's agent and on behalf of the plaintiff, the defendant on or about 13th April, 1965 received from Alagappa $ 6,50,000 equivalent to Rupees 16,12,000 at the rate of 248 rupees per 100 dollars for the ¼th share of the plaintiff in the said firm taken over by Alagappa.

8. The defendant from Madras has sent to the plaintiff at Kottaiyur Rupees 25,000 on 25th October, 1965, Rs. 1,30,750 on 7th February, 1966, Rs. 25,311.65 on 7th February, 1965 (Rupees 25,000 plus Rs. 311.65P. for interest) and Rs. 4,56,340 on 11th August, 1967.

9. The defendant as plaintiff's agent is bound to render true and correct account to the plaintiff, of all the amounts received by him in the course of the agency, to wit, from 22nd January, 1965 the amounts received from Alagappa."

In paras. 6 and 7 the plaint refers to the plaintiff and the defendant retiring from the partnership and Alagappa taking the shares of the plaintiff and the defendant for a consideration of his paying equivalent to Rs. 16,12,000 to each the plaintiff and the defendant. In para. 7 it is stated that the defendant as plaintiff's agent received Rs. 16,12,000. Paragraph 8 refers to certain payments which the plaintiff received from the defendant. Paragraph 9 of the plaint states that the defendant as plaintiff's agent is bound to render true and correct account to the plaintiff of all the amounts received by him in the course of agency, to wit, from 22nd January, 1965, the amounts received from Alagappa. It may be noted that the relief sought for is for rendering true and correct account to the plaintiff of all the amounts received by him in the course of the agency. The Power-of-Attorney was given on 22nd January, 1965 and thus the relief is not confined to the amount payable by Alagappa alone.

4. In paragraph 10 which is not taken note of by the High Court the plaintiff alleged that on 2nd September, 1967 and 4th October, 1967, the plaintiff wrote to the defendant requiring him to send the accounts of the agency. These letters were refused. Again on 5th December, 1967, the plaintiff issued a lawyer's notice to render accounts and for payment of the amounts due from him. This notice was also returned. The defendant did not render any accounts. At this stage reference may be made to the Power-of-Attorney executed by the plaintiff in favour of the defendant on 22nd January, 1965.

5. The plaintiff by the Power-of-Attorney dated 22nd January, 1965, constituted the defendant as his Attorney and authorised the defendant to act for the plaintiff. It is sufficient to state that the power auhorises in general the defendant to manage all the affairs of the plaintiff. Para. 3 of the Power-of-Attorney empowers the defendant to pay and settle all the debts of the plaintiff and obtain full and effectual receipts and releases for the same. Para. 5 empowers the defendant amongst other things to sign and execute any discharge or releases in connection with charges or bills of sale. Para. 10 gives the power to the defendant to charge or mortgage any of the plaintiff's property and paragraph 11 to borrow such sums of money and upon such terms as the Attorney shall deem expedient. Para. 19 confers the power on the defendant to invest moneys upon mortgages or charges of land etc. In short there can be no dispute that complete power of management is given to the defendant and the defendant could, in exercising this power discharge debts, invest moneys on behalf of the plaintiff etc. When the plaintiff in para. 7 of the plaint demanded the agent to render true and correct account to the plaintiff of all the amounts received by him in the course of agency *i.e.*, by virtue of the power conferred on 22nd January, 1965, the plaintiff is entitled to know as to what amounts the defendant received during the course of his management and what amounts he had invested or otherwise dealt with. At the date of the plaint

the plaintiff was not aware as to the amount of moneys that were due by the defendant to him. The letters and the lawyer's notice sent by the plaintiff to the defendant were unanswered. If the defendant had invested or otherwise dealt with moneys according to the power conferred on him nothing would be due to the plaintiff on accounts being taken. The relief claimed for in the plaint in para. 14 (*a*) of the plaint is for directing the defendant to render true and correct account of all transactions made by the defendant as the plaintiff's agent from 22nd January, 1965 and also for all the amounts received by the defendant on the plaintiff's behalf as his agent including the amount recovered by him from Alagappa and pay the plaintiff what may be found due to him. This paragraph makes it clear that what was required was not only an account of the amount recovered by the defendant from Alagappa but also an account of all the transactions of the defendant as the plaintiff's agent from 22nd January, 1965.

6. A reading of the written statement also makes it clear that the plaint was understood by the defendant as a suit for accounting for his management as a power-of-attorney agent. In para. 7 of the written statement the defendant states that out of 6,50,000 dollars got for the plaintiff's one-fourth share 40,000 dollars were invested in fixed deposit in plaintiff's name with the Indian Overseas Bank, Kuala Lumpur and 10,000 dollars in plaintiff's V. C. T. M. Accounts on 10th April, 1965. On the same day the remaining 6,00,000 dollars were invested with Alagappa Chettiar himself who had credited the amount in plaintiff's name in his accounts. If the defendant was able to prove these contentions the accounts as required by the plaintiff would have been satisfactorily rendered and very little would have been due by the defendant to the plaintiff on accounting. The High Court was in error in coming to the conclusion that the plaint is clear that apart from the money which the defendant is liable to pay to him as his agent, the plaintiff has quantified the amount at Rs. 9,74,598-35 as payable by the defendant to him. In our view, the plaint has been misread. Though paras. 6, 7 and 8 refer to the transactions in which the plaintiff is entitled to Rs. 16,12,000, paras. 10, 11 and 14 (*a*) make it clear that the suit was for accounting not only regarding Rs. 16,12,000 but also for the management by the defendant as power-of-attorney agent. The power, as already noted, confers a right on the defendant to invest moneys. If the defendant as shown in the written statement itself is able to establish that in the course of his management he had invested moneys according to the power conferred on him he would have properly accounted for his management. In the written statement the defendant himself had pleaded that the moneys which he received from Alagappa have been remitted to the plaintiff by investment and otherwise. The conclusion arrived at by the High Court is, therefore, unsupportable.

7. The provision relating to the levy of court-fee for a suit on accounts is found in section 7 (*iv*) (*f*) of the Court-fees Act, 1870 which runs as follows:

> "7. The amount of fee payable under this Act in the suits next hereinafter shall be computed as follows:
>
> (*i*) to (*iii*) * * * *
>
> (*iv*) In suits—
>
> (*a*) to (*e*) * * * *
>
> (*f*) for accounts—
>
> according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.
>
> In all such suits the plaintiff shall state the amount at which he values the relief sought".

Reading this provision by itself the amount of court-fee payable in suits for accounts is according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. The plaintiff is required to state the amount at which he values the relief sought. In suits for accounts it is not possible for the plaintiff to estimate correctly the amount which he may be entitled to for, as in the present case, when the plaintiff asks for accounting regarding the management by a power-of-attorney agent, he might not know the state of affairs of the defendant's management and the amount to which he would be entitled to on accounting. But it is necessary that the amount at which he values the

relief sought for should be a reasonable estimate. Section 35 (1) of the Tamil Nadu Court-fees and Suits Valuation Act, XIV of 1955, is as follows:

> "In a suit for accounts, fee shall be computed on the amount sued for as estimated in the plaint".

Sub-section (2) of section 35 provides:

> "Where the amount payable to the plaintiff as ascertained in the suit is in excess of the amount as estimated in the plaint, no decree directing payment of the amount as so ascertained shall be passed until the difference between the fee actually paid and the fee that would have been payable had the suit comprised the whole of the amount as ascertained, is paid. If the additional fee is not paid within such time as the Court may fix, the decree shall be limited to the amount to which the fee paid extends".

While section 35 (1) permits the plaintiff to pay the court-fee on the amount estimated by him, sub-section (2) safeguards against the loss of revenue as it requires that no decree for any amount in excess of the amount as estimated in the plaint shall be passed unless the difference between the fee actually paid and the fees that would have been payable had the suit comprised the whole of the amount as ascertained, is paid. But here again it is necessary that the plaintiff should give a fair estimate of the amount for which he sues. Order 7, rule 11 of the Civil Procedure Code, requires the Court to return the plaint if the relief claimed is undervalued. Order 7, rule 11, runs thus:

> "11. The plaint shall be rejected in the following cases:
>
> (*a*) * * * * *
>
> (*b*) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
>
> (*c*) and (*d*) * * * *"

This section casts a duty on the Court to reject the plaint when the relief claimed is undervalued. If on the materials available before it the Court is satisfied that the value of relief as estimated by the plaintiff in a suit for accounts is undervalued the plaint is liable to be rejected. It is therefore necessary that the plaintiff should take care that the valuation is adequate and reasonable taking into account the circumstances of the case. In coming to the conclusion that the suit is undervalued the Court will have to take into account that in a suit for accounts the plaintiff is not obliged to state the exact amount which would result after the taking of the accounts. If he cannot estimate the exact amount he can put a tentative valuation upon the suit for accounts which is adequate and reasonable. The plaintiff cannot arbitrarily and deliberately undervalue the relief. A Full Bench of the Andhra Pradesh High Court in a decision in *Chillakuru Chenchuram Reddy* v. *Kanupuru Chenchurami Reddy*[1], after elaborate consideration of the case-law on the subject has rightly observed that there must be a genuine effort on the part of the plaintiff to estimate his relief and that the estimate should not be a deliberate under-estimation.

8. On a consideration of the entire circumstances of the case we are not satisfied that the estimate of the relief as given by the plaintiff is inadequate or unreasonable or a deliberate under-estimation. In the result, we allow the appeal set aside the judgment of the Madras High Court and remit it back to the High Court for disposal of all the issues arising in the appeal. The costs will abide by the result.

V.K. ——— *Appeal allowed.*

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1. I.L.R. (1969) A.P. 1042.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—*S. Murtaza Fazl Ali and O. Chinnappa Reddy, JJ.*

Arunachalam .. *Appellant**

v.

P. S. R. Sadhanantham .. *Respondent.*

(A) *Constitution of India* (1950), *Article 136—Criminal trial—Judgment of acquittal by High Court—Appeal by special leave — Confines of Jurisdiction of Supreme Court.*

Article 136 of the Constitution invests the Supreme Court with a plenitude of plenary appellate power over all Courts and tribunals of India. The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But the very nature of the power led the Court to set limits to itself within which to exercise such power. It is now the well-established practice of the Supreme Court to permit the invocation of the power under Article 136 only in exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the Court. But within the restrictions imposed by itself, the Supreme Court has the undoubted power to interfere even with findings of facts making no distinction between judgments of acquittal and conviction, if the High Court, in arriving at these findings, has acted perversely or otherwise improperly. [*Para.* 4.]

In dealing with an appeal against acquittal, the Court will, naturally keep in mind the presumption of innocence in favour of the accused, reinforced as may be, by the judgment of acquittal. But, also, the Court will not abjure its duty to prevent violent miscarriage of justice by hesitating to interfere where interference is imperative. Where the acquittal is based on irrelevant ground, or where the High Court allows itself to be deflected by red herrings drawn across the track, or where the evidence accepted by the trial Court is rejected by the High Court after a perfunctory consideration, or where the baneful approach of the High Court has resulted in vital and crucial evidence being ignored, or for any such adequate reason, the Supreme Court may feel obliged to step in to secure the interests of justice, to appease the judicial conscience, as it were. [*Para.* 4.]

(B) *Constitution of India* (1950), *Article 136—Jurisdiction of Supreme Court under—Competency of a private party to invoke, against a judgment of acquittal in criminal trial.*

Appellate power vested in the Supreme Court under Article 136 of the Constitution is not to be confused with ordinary appellate power exercised by appellate Courts and appellate tribunals under specific statutes. It is a plenary power, exercisable outside the purview of ordinary law to meet the pressing demands of justice. Article 136 neither confers on anyone the right to invoke the jurisdiction of the Supreme Court nor inhibits anyone from invoking the Court's jurisdiction. The power is vested in the Supreme Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of the Supreme Court is not circumscribed by any limitation as to who may invoke it. Where a judgment of acquittal by the High Court has led to a serious miscarriage of justice the Supreme Court cannot refrain from doing its duty and abstain from interfering on the ground that a private party and not the State has invoked the Court's jurisdiction. The Supreme Court can entertain appeal against judgments of acquittal by the High Court at the instance of private parties also. The circumstance that the Criminal Procedure Code does not provide for an appeal to the High Court against an order of acquittal by a Subordinate Court, at the instance of a private party has no relevance to the question of the power of the Supreme Court under Article 136. Whether it is the State or a private party that invokes the jurisdiction, special leave is not granted as a matter

* Crl.A. No. 170 of 1973.

6th March, 1979.

of course but only for good and sufficient reasons as well-established by the practice of the Supreme Court. [*Para.* 5.]

Cases referred to:—

State of Madras v. *Vaidyanatha Iyer*, 1958 S.C.R. 580: 1958 S.C.J. 335: (1958) 1 An.W.R. (S.C.) 136: (1958) 1 M.L.J. (S.C.) 136: (1958) M.L.J. (Cr.) 299: A.I.R. 1958 S.C. 61; *Himachal Pradesh Administration* v. *Om Prakash*, (1972) 1 S.C.C. 249; *Durga Shanker Mehta* v. *Thakur Raghuraj Singh*, (1955) 1 S.C.R. 267: 1954 S.C.J. 723: (1954) 2 M.L.J. 385: A.I.R. 1954 S.C. 520; *Mohan Lal* v. *Ajit Singh*, (1978) 3 S.C.C. 279.

The Judgment of the Court was delivered by

Chinnappa Reddy, J.—P. S. R. Sadhanantham and four others were tried by the learned Sessions Judge, Tirunelveli, on various counts. Sadhanantham (A-1) was convicted under sections 148 and 302, Indian Penal Code, while the four others were convicted under sections 147, 323 and 149 read with section 323. The first accused was sentenced to imprisonment for life on the charge of murder and to rigorous imprisonment for a period of two years on the charge under section 148. The others were sentenced to suffer imprisonment for a period of one year on each of the counts on which they were convicted, the sentences to run concurrently. All the five accused preferred an appeal to the High Court of Madras. The High Court allowed the appeal and acquitted of all the accused of all the charges. Arunachalam, the brother of the deceased has preferred this appeal against the judgment of the Madras High Court after obtaining special leave from this Court on 26th July, 1973. The special leave was granted against the first accused Sadhanantham only.

2. The case of the prosecution, briefly, was that there was enmity between the deceased Soundarapandian and his brother Arunachalam (P.W. 2) and Natesan (P.W. 3) on one side and Rajapalavasmuthu Nadar, his sons A-1 and A-2 and his nephews A-4 and A-5 on the other. There were the usual disputes arising out of elections to the Gram Panchayat and to the local co-operative stores. In connection with the village Amman festival, P.W. 3 was arranging to have a dance performance on the night of 20th August, 1970, in the Gandhi Maidan. About a week earlier, Sadhanantham, the first accused demanded that the dance should be performed under his presidentship but P.W. 3 did not agree. On the night of 20th August, 1970, P.W. 3 along with one Gopalakrishnan (P.W. 6) was decorating the stage. Tube lights were burning and several persons had gathered in front of the stage. At about 8.45 P.M. accused 1 to 5 came there and got up on the stage. A-1 questioned P.W. 3 how he dared to conduct the show without his presiding over it. P.W. 3 replied that the dance performance would be conducted without the presidentship of A-1. A-1 then slapped P.W. 3 on the cheek. A-2 to A-4 also started beating P.W. 3 with their hands. P.W. 6 and several others who were there ran away apparently not wanting to get involved in the fracas. P.W. 3 jumped down from the stage and attempted to run away when A-3 caught him and began to throttle his neck. A-1, A-2 and A-4 joined in beating him with their hands. The deceased P.W. 1, P.W. 2 and P.W. 5 came running towards P.W. 3. The deceased asked the first accused why they were beating his younger brother. A-3 and A-5 who were holding P.W. 3 by the neck let him free. A-1 asked the deceased who he was to question him and saying so he took out a knife from his waist and stabbed the deceased on the left flank. The deceased fell down dead shouting "stabbed, stabbed". Accused 1 to 5 then ran towards the north. P.W. 3 chased them over a distance of about one and half furlongs. They ran inside the forest. P.W. 3 stopped chasing them further. In the meanwhile the injured Soundarapandian was taken by P.Ws. 1, 2 and 5 to the Police Station and then to the hospital at Kayalpattinam. At the police station, the writer P.W. 14 recorded a statement Exhibit P-1 from Soundarapandian at 9-15 P.M. Soundarapandian when asked to sign the statement insisted on signing the statement after dipping the pen in the blood that was coming out of the wound. He was taken to the

hospital in a jeep requisitioned by the police. P.W. 5 the Medical Officer in charge of the Hospital examined the injured and found that the injury was of a serious nature. He sent the injured to the Government Head-quarters Hospital at Tuticorin for further treatment. The District Medical Officer, P. W. 8 examined him and finding his condition very serious, sent a requisition Exhibit P-5 to the Sub-Magistrate, Tuticorin, to record the dying declaration of Soundarapandian. Exhibit P-6, the dying declaration was recorded by the Magistrate P.W. 7 at 1.30 A.M. At 7.45 A.M. next morning, P.W. 8 performed an operation but Soundarapandian could not be saved. He died at about 1.30 P.M. The autopsy was conducted by P.W. 9, who, on dissection found that the diaphragm and the upper lobe of the left lung had been pierced. The police after completing the investigation laid a charge-sheet against Sadhananantham, Nithiyanantham, Thamlian, Kumaresen and Karthikeyan.

3. In support of its case, the prosecution examined P.Ws. 1, 2, 3 and 5 as direct witnesses to the occurrence and relied upon Exhibits P-1 and P-6, the two dying declarations made by Soundarapandian. The prosecution also examined P.W. 6 to speak to the earlier part of the incident. All the accused denied the offence and stated that they were falsely implicated on account of enmity. In the cross-examination of the witnesses it was suggested that one Ramalingam was also injured at the same time and place. It was suggested that P.Ws. 2 and 3 had prevailed upon the deceased to name A-1 as the person who stabbed him. The learned Sessions Judge accepted the dying declarations as true. He also accepted the evidence of the eye witnesses. He convicted and sentenced the five accused as mentioned earlier. The High Court acquitted the accused primarily on the ground that neither the direct witnesses nor the dying declarations explained the serious injury caused to Ramalingam, who it appeared from the evidence of the Doctor, P. W. 4 had received a stab-injury 5 cms. × 2 cms. × 2 cms. near the left-side of the abdomen on the back. The High Court thought that though Exhibit P-1 was purported to have been recorded earlier than Exhibit P-6 in point of time, it was in fact recorded later. The High Court took the view that the first accused must have been implicated by the deceased as the assailant in Exhibit P-6 at the instance of P.W. 3, who met him in the hospital at about 1 A.M. The evidence of the direct witnesses P.Ws. 1, 2, 3 and 5 was rejected on the ground that they were interested and had not explained how Ramalingam sustained the injury found on him. The conduct of P.W. 3 was also severely commented upon. The High Court acquitted all the five accused.

4. Before proceeding to discuss the evidence and the findings of the High Court we remind ourselves of the confines of our jurisdiction to deal with appeals by special leave against judgments of acquittal by the High Court. Article 136 of the Constitution of India invests the Supreme Court with a plenitude of plenary, appellate power over all Courts and Tribunals in India. The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the Court to set limits to itself within which to exercise such power. It is now the well-established practice of this Court to permit the invocation of the power under Article 136 only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the Court. But, within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact, making no distinction between judgments of acquittal and conviction, if the High Court, in arriving at those finding, has acted "perversely or otherwise improperly". (See *State of Madras* v. *Vaidyanatha Iyer*[1] and *Himachal Pradesh Administration* v. *Om Prakash*[2].) In dealing with an appeal against acquittal, the Court will, naturally, keep in mind the presumption of innocence in favour of the accused, reinforced, as may be, by the judgment of acquittal. But, also, the Court will not abjure its duty to prevent violent miscarriage of justice by hesitating to interfere where interference is imperative. Where the acquittal is based on irrelevant

1. 1958 S.C.J. 335 : (1958) 1 An.W.R. (S.C.) 136 : (1958) 1 M.L.J. (Crl.) 299 : 1958 S.C.R. 580 : A.I.R. 1958 S.C. 6.

2. (1972) 1 S.C.C. 249.

ground, or where the High Court allows itself to be deflected by red herrings drawn across the track, or where the evidence accepted by the trial Court is rejected by the High Court after a perfunctory consideration, or where the baneful approach of the High Court has resulted in vital and crucial evidence being ignored, or for any such adequate reason, this Court may feel obliged to step in to secure the interests of justice, to appease the judicial conscience, as it were.

5. A doubt has been raised about the competence of a private party, as distinguished from the State, to invoke the jurisdiction of this Court under Article 136 of the Constitution against a judgment of acquittal by the High Court. We do not see any substance in the doubt. Appellate power vested in the Supreme Court under Article 136 of the Constitution is not to be confused with ordinary appellate power exercised by Appellate Courts and Appellate Tribunals under specific statutes. As we said earlier, it is a plenary power, 'exercisable outside the purview of ordinary law' to meet the pressing demands of justice (Vide *Durga Shanker Mehta* v. *Thakur Raghuraj Singh and others*[1]). Article 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of the Supreme Court nor inhibits anyone from invoking the Court's jurisdiction. The power is vested in the Supreme Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of the Supreme Court is not circumscribed by any limitation as to who may invoke it. Where a judgment of acquittal by the High Court has led to a serious miscarriage of justice the Supreme Court cannot refrain from doing its duty and abstain from interfering on the ground that a private party and not the State has invoked the Court's jurisdiction. We do not have the slightest doubt that we can entertain appeals against judgments of acquittal by the High Court at the instance of private parties also. The circumstance that the Criminal Procedure Code does not provide for an appeal to the High Court against an order of acquittal by a Subordinate Court, at the instance of a private party, has no relevance to the question of the power of this Court under Article 136. We may mention that recently in *Mohan Lal* v. *Ajit Singh*[1], this Court interfered with a judgment of acquittal by the High Court at the instance of a private party. An apprehension was expressed that if appeals against judgments of acquittal at the instance of private parties are permitted there may be a flood of such appeals. We do not share the apprehension. Appeals under Article 136 of the Constitution are entertained by special leave granted by this Court. Whether it is the State or a private party that invokes the jurisdiction of this Court, special leave is not granted as a matter of course but only for good and sufficient reasons, as well established by the practice of this Court.

6. As earlier mentioned, the primary reason given by the High Court for rejecting the testimony of the direct witnesses and the dying declarations was the supposed failure of the prosecution to explain the serious injury found on the person of one Ramalingam alleged to have been injured at the same time and place as the deceased. We may at once say that nothing is known about this Ramalingam. He is not shown to be connected, even remotely, either with the prosecution party or with the faction of the accused. He was very surreptitiously and dexterously introduced into the case in the course of the cross-examination of the prosecution witness and thereafter made to loom large. He was, as we shall presently point out nothing more than a "red herring" across the track. We will refer to the whole of the evidence where Ramalingam was made to appear in the case to examine whether the High Court was right in rejecting the entire case of the prosecution on the ground that the injury on Ramalingam was not explained. P.W. 1 was put but one question whether he was aware that injuries were caused to one Ramalingam Nadar at the place of the occurrence on the night of occurrence. He stated that he was not aware of that fact. No further ques-

1. 1954 S.C.J. 723 : (1954) 2 M.L.J. 385 : (1955) 1 S.C.R. 267 : A.I.R. 1954 S.C. 520.

1. (1978) 3 S.C.C. 279 : A.I.R. 1978 S.C. 1183.

tion was put to P.W. 1 pursuing the matter. Similarly P.W. 2 was also asked in cross-examination whether he was aware of the stabbing of one Ramalingam Nadar at the time of occurrence. He stated that he was not and that was the end of the matter and it was not pursued further. P.W. 3 was also asked the same question. He too denied knowledge of injuries sustained by Ramalingam Nadar on the night of occurrence. P.W. 5 was also asked a similar question and he too gave a similar answer. P.W. 4 the Medical Officer, Kayalpattinam, deposed in his evidence that he examined one Ramalingam at about 11-30 P.M. on 20th August, 1970, and found an incised wound 5 cms. × 2 cms. × 2 cms. near the left-side of the abdomen on the back and one small irregular edged wound on the inner side of the first injury. The Doctor also stated that Ramalingam told him that he was assaulted by some unknown person when he was witnessing the dance show. P.W. 10 who had gone to witness the dance performance but who ran away when trouble started stated that when he was running away he saw one Ramalingam Nadar running along with him and that the said Ramalingam Nadar was keeping his hand near his waist and that the hand was bloodstained. P.W. 15 the Head Constable attached to the Arumuganeri Police Station stated that 4 or 5 days after the occurrence he came to know that a case was registered in Arumuganeri Police Station on the strength of a complaint given by one Ramalingam. P.W. 16, the Investigating Officer also stated that the First Information Report registered on the strength of Ramalingam's complaint had also been sent to the Magistrate and that a final report had also been sent. He denied the suggestion made to him that the First Information Report in respect of Ramalingam's complaint was suppressed as it was not in favour of the prosecution. These are all the appearances which Ramalingam made, on the stage of this case, in the mouth of the witnesses, though Ramalingam did himself not enter upon the scene. None of the accused made any reference to Ramalingam in his statement. It would be noticed that it was not suggested to any of the prosecution witnesses that Ramalingam was connected with either the prosecution party or the party of the accused. It was not suggested that the injury to Ramalingam was caused by a member of either group. It was not suggested that Ramalingam intervened in the fight and received an injury. In fact there was nothing to suggest that Ramalingam and the deceased received their respective injuries in the course of the same transaction. The only suggestion was that Ramalingam received an injury that night at the place of occurrence. It is in evidence that as soon as trouble started, the people who had gathered there started running helter skelter. While so running Ramalingam apparently received a stab injury accidentally or deliberately from someone. In fact according to the evidence of the Doctor, Ramalingam told him that he did not know who his assailant was. There was, therefore, absolutely nothing to connect the stabbing of Ramalingam with the stabbing of the deceased Sounderapandian. The evidence of P.W. 10 also was to the effect that Ramalingam himself was one of those who ran away from the scene along with him and that was before the deceased was stabbed. There was thus nothing to indicate that the deceased or any of the direct witnesses were aware or could possibly be aware of the injury caused to Ramalingam. In our opinion the High Court was entirely wrong and wholly unjustified in rejecting the testimony of the direct witnesses and the dying declarations on the irrelevant consideration that they did not explain the injury found on the person of Ramalingam.

7. In regard to the dying declarations the reason given by the High Court to conclude that Exhibit P-1 must have been recorded later than Exhibit P-6 was that Exhibit P-1 contained several statements not to be found in Exhibit P-6. We are afraid that the High Court was merely indulging in speculation and approaching the question from the wrong end. Exhibit P-1 which was recorded by P.W. 14 was as follows:

"Arumuganeri is my native place. I am doing shop business. Record dance was arranged to take place in Gandhi Maidan at Arumuganeri. I went to see the record dance along with Arunachala Nadar my elder brother, Gunasekaran youngar sister's

husband, and Somasundaram son of Adinarayana Perumal. We were talking, standing in front of Ramaswami temple. Sadanandam, Nithianandam, sons of P. S. Raja Nadar. Tamliam *alias* Subramaniam, Kumaresan son of Thangapla Nadar, Karthikeyan son of Raja Pandia Nadar were beating my younger brother Natesan, on the north of the dancing stage. Myself, and the persons with me ran to that place. I questioned as to why you beat my younger brother. Sadanandam son of P. S. Raja Nadar forcibly stabbed me with the greece knife in his hand, on my left flank, below the rib, I cried to the effect "Ayyoh; stabbed". I covered the stab injury with my hand. My elder brother and Somasundaram, took me to Police Station. There is prior enmity between myself and P. S. Rajavagaria in connection with the elections. I read the statement. It has been recorded as narrated by me.

Sd. Sounderapandian".

Exhibit P-6 which was recorded by the Sub-Magistrate, was as follows:

"There is one Gandhi Maidan in Arumuganeri. Record dance was to be performed there. I went to see it. The dance was not begun. Myself, Arunachalam, my elder brother, Gunasekaran, my sister's husband were all talking. There was quarrel at the place of performance of the record dance. At that time, the record dance was not begun. Myself and others ran to the place where the quarrel took place. A boy called Sadanandam son of P. S. Raja Nadar stabbed me with a knife. I cried to effect "Ayyoh, stabbed, stabbed" . The police station is very near. We all went there. My hand was stained with blood. There is no reason for stabbing me.

L.T.I. of Thiru Soundarapandian".

It is true that Exhibit P-1 gives more details than Exhibit P-6. Exhibit P-1 mentions the names of A-2, A-3, A-4 and A-5 also in connection with the beating of P.W. 3. It also mentions that the deceased was stabbed on the left flank below the rib. It further mentions the prior enmity between the deceased and P. S. Rajavagaria. On the contrary Exhibit P-6 gives fewer details, and does not mention the names of the participants in the fight which preceded the stabbing of the deceased. The stabbing of the deceased by A-1 alone is particularly mentioned. What is important to be noted in Exhibit P-6 is that it refers to the circumstance that the deceased first went to the Police Station. That statement lends support to the prosecution case that the deceased and others went to the Police Station and a statement was recorded at the Police Station from the deceased. What is more important is the circumstance that while Exhibit P-1 was recorded within a very short time after the occurrence, Exhibit P-6 was recorded a few hours after the occurrence by which time the condition of the deceased had apparently deteriorated and he was not in a position to make as detailed a statement as P-1. The evidence of the District Medical Officer, P.W. 8, shows that when he saw him at 1 A.M. the condition of the deceased was very bad. Exhibit P-6 was recorded, it may be noted at 1-25 A.M. It would also be seen that the condition of Soundarapandian at that time was such that his thumb impression and not his signature could be taken on Exhibit P-6. The reason for less particulars in P-6 was quite obvious but yet the High Court completely missed it because of its wrong approach. There was no reason whatsoever to doubt the genuineness of Exhibit P-1 or P-6. The High Court thought that P.W. 3 might have met the deceased in the Tuticorin hospital at 1 A.M. and induced him to implicate the first accused. This was nothing but speculation. As we mentioned the condition of the deceased was very bad at 1 A.M. and it is too much to think that anybody would have been allowed to go near the deceased in the critical condition in which he was in the hospital and to tutor him to implicate someone falsely.

8. The evidence of three of the eye-witnesses namely P.Ws. 1, 2 and 5 was dealt with by the High Court in a most summary and perfunctory way. It was said:

"The name of this witness (P.W. 1) was not mentioned by the deceased in Exhibit P-6. It has been elicited from this

witness that there was bitter enmity between him and the family of the accused. This witness was appointed by the deceased as a clerk in Arumuganeri Co-operative Stores and in the Panchayat election, P.W. 1 proposed the name of the person who stood against the father of accused 1 and 2. He was a prosecution witness in a criminal case instituted against the father of accused 1 and 2. This witness is not only interested in the deceased as he was employed under the deceased as a clerk but also inimically disposed towards the family of the accused. It will, therefore, be unsafe to rely upon his evidence. P.W. 2 is the brother of the deceased and P.W. 5 is the brother-in-law of the deceased. They are very much interested in the deceased and they were also inimically disposed towards the accused. They are not telling the truth. They have not explained as to how Ramalingam sustained the injury. They have fallen in line with the statements made in the dying declaration. We do not accept their evidence".

The reasons given were that the witnesses were interested and that they had not explained the injury found on the person of Ramalingam. In the case of P.W. 1 it was also stated that his name was not mentioned in Exhibit P-6. We do not think that the criticism of the High Court bears any scrutiny. We have perused the evidence of P.Ws. 1, 2 and 5 and we are unable to discard their testimoney for the sole reason that they are interested witnesses. With regard to P.W. 3 however, there is scope for much criticism having regard to his conduct subsequent to the incident. According to his evidence after he chased the accused he stopped for about an hour near the forest and returned to the village thereafter. While he was on his way back he saw his uncle's jeep on the road and learnt from his uncle that Sounderapandian had been taken to the hospital at Tuticorin. Therefore, he went to Tuticorin and saw his brother in the hospital at about 1 A.M. Thereafter he went to a hotel where he slept for the night. Next morning without going to the hospital to find out the condition of his brother he returned to the village and made himself available to the police for questioning at about 1 P.M. Though there cannot be any doubt that he witnessed the occurrence his subsequent conduct does not inspire such confidence as to place implicit reliance on his evidence. We, therefore, agree with the High Court that P.W. 3 was not a reliable witness.

9. In our view the two dying declarations Exhibits P-1 and P-6 may be relied upon without any reservation and the evidence of P.Ws. 1, 2 and 5 may also be safely accepted. We have considered the reasons given by the High Court for acquitting the first accused and we find them wholly unsatisfactory. In the light of the principles set out by us earlier we think that the interests of justice demand that we should interfere with the order of acquittal in the present case. Accordingly, we allow the appeal, set aside the judgment of the High Court and restore the judgment of conviction and sentence passed by the learned Sessions Judge of Tirunelveli against the respondent (first accused) on the charge under section 302, Indian Penal Code.

V.K. ——— *Appeal allowed.*

[End of Volume (1979) 2 M.L.J. (S.C.)]